Supreme Court, U.S.
FILED
04 770 DEC 2 - 2004
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

STATE OF LOUISIANA,
Petitioner,

versus

QUINCY BROWN,
Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

EDDIE J. JORDAN, JR.
District Attorney
Orleans Parish

DONNA RAU ANDRIEU
Assistant District Attorney
619 South White Street
New Orleans, LA 70119
(504) 822-2414

Riverside Printing, L.L.C., 4939 Tchoupitoulas, N. O., LA 70115, (504) 897-5000

QUESTION PRESENTED FOR REVIEW

1. Whether the enhancement of an adult sentence with the use of a juvenile adjudication in which the juvenile was not provided the right to a jury trial denies the defendant's right not to be deprived of liberty without due process of law?

PARTIES TO THE PROCEEDINGS

1. State of Louisiana, through Orleans Parish District Attorney, Eddie J. Jordan, Jr. and Assistant District Attorney, Donna Rau Andrieu, Plaintiff – petitioner.

2. Quincy Brown, Defendant-respondent.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Relevant Constitutional Provisions 2

Statement of the Case 3

Reasons for Granting the Petition 5

Conclusion 10

APPENDIX

A. Supreme Court of Louisiana Rehearing Denied 1-a

B. Judgment of the Supreme Court of Louisiana 3-a

C. Louisiana Fourth Circuit Court of Appeal Rehearing Denied 30-a

D. Judgment of the Louisiana Fourth Circuit Court of Appeal 31-a

TABLE OF AUTHORITIES

CASE **Page**

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 1, 2, 4, 5, 6, 7, 8, 10

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 9

Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) 8

McKeiver v. Pennsylvania, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971) 9

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) 7

United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) 7

State v. Brown, 853 So. 2d 8, 2002-1217 (La. App. 4 Cir. 5/28/03) 2

State v. Brown, 978 So. 2d 1276, *reh'g denied*, 2003-2788 (La. 7/6/04) 2

CONSTITUTIONAL PROVISIONS

AMENDMENT V 2
AMENDMENT VI 2
AMENDMENT VIII 3
AMENDMENT XIV 3

STATUTES **Page**

28 U.S.C. 1257 2

La. Rev. Stat. 14:27(30) 1, 3

La. Rev. Stat. 14:64 . . . . . 1, 3

La. Rev. Stat. 14:65 1,3

La. Rev. Stat. 15:529.1 . . . . . 1, 2, 3, 4, 5

OPINIONS BELOW

On May 10, 1999, the State of Louisiana charged Quincy Brown by bill of information with two counts of attempted first-degree murder (La. Rev. Stat. 14:27(30)), one count of armed robbery (La. Rev. Stat. 14:64), and one count of simple robbery (La. Rev. Stat. 14:65) under Orleans Parish Criminal District Court Case No. 406-890. The State of Louisiana later entered a *nolle prosse* as to one of the attempted murders. Brown pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining attempted first-degree murder charge. On October 3, 2001, the jury acquitted Brown of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced Brown to serve ninety-nine years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery conviction, the maximum sentence under La. Rev. Stat. 14:64, and to seven years at hard labor with benefits for the simple robbery conviction. The sentences were ordered to run concurrently with credit for time served.

The State then filed a multiple offender bill of information, charging Brown as a habitual offender pursuant to La. Rev. Stat. 15:529.1. The predicate conviction upon which the multiple bill of information was based was a juvenile adjudication for attempted second-degree murder. Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing that the use of Brown's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is unconstitutional. Brown urged that the use of the adjudication to enhance his sentence violated this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because in his juvenile delinquency proceeding he was not afforded

the right to a jury trial. The trial court denied the motion and found Brown a second felony offender. Brown's sentences were vacated and he was re-sentenced to one hundred ninety-eight years at hard labor without benefit of parole for the armed robbery conviction and to a concurrent term of fourteen years for the simple robbery conviction. Brown appealed his sentence as excessive and unconstitutional under *Apprendi*.

On May 28, 2003, the Louisiana Fourth Circuit Court of Appeal affirmed Brown's conviction, but reversed his sentence as violative of *Apprendi*. See, *State v. Brown*, 853 So. 2d 8, 2002-1217 (La. App. 4 Cir. 5/28/03). The State's application for rehearing was denied on September 9, 2003. On July 6, 2004, the Supreme Court of Louisiana affirmed Brown's sentence, holding the use of juvenile adjudications as predicate offenses under La. Rev. Stat. 15:529.1 as violative of *Apprendi*. See, *State v. Brown*, 879 So. 2d 1276, *reh'g denied*, 2003-2788 (La. 7/6/04). On September 3, 2004, the State's application for rehearing was denied.

STATEMENT OF JURISDICTION

The judgment upon which the State of Louisiana seeks review was entered on July 6, 2004 by the Supreme Court of Louisiana. The State's application for rehearing was denied on September 3, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

1.) AMENDMENT V of the U.S. Constitution
2.) AMENDMENT VI of the U.S. Constitution

3.) AMENDMENT VIII of the U.S. Constitution
4.) AMENDMENT XIV of the U.S. Constitution

STATEMENT OF THE CASE

On May 10, 1999, Quincy Brown was charged by bill of information with two counts of attempted first-degree murder (La. Rev. Stat. 14:27(30)), one count of armed robbery (La. Rev. Stat. 14:64), and one count of simple robbery (La. Rev. Stat. 14:65). The State later entered a *nolle prosequi* as to one of the attempted first degree murder counts. Brown pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining attempted first-degree murder charge. The jury acquitted Brown of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced Brown to serve ninety-nine years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery conviction, the maximum sentence under La. Rev. Stat. 14:64, and to seven years at hard labor with benefits for the simple robbery conviction. The sentences were ordered to run concurrently with credit for time served.

The State then filed a multiple offender bill of information, charging Brown as a habitual offender pursuant to La. Rev. Stat. 15:529.1. The pertinent language of the statute provides:

> A. (1) Any person who, having been convicted within this state of a felony or adjudicated a delinquent under Title VIII of the Louisiana's Children's Code for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous

> Substances Law involving the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance or a crime of violence as listed in Paragraph (2)[1] of this Subsection, or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less than one-half the longest term and not more than twice the longest term prescribed for a first conviction;

The predicate conviction upon which the multiple bill was based was a juvenile adjudication for attempted second-degree murder. Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing that the use of Brown's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is unconstitutional. Brown urged that the use of the adjudication to enhance his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 120

---

[1] Paragraph 2 lists the following crimes: attempted first-degree murder; attempted second-degree murder; manslaughter; armed robbery; forcible rape, simple rape, second-degree kidnapping; a second or subsequent aggravated battery; a second or subsequent aggravated burglary; and a second or subsequent offense of burglary of an inhabited dwelling.

S. Ct. 2348, 147 L. Ed. 2d 435 (2000) because in his juvenile delinquency proceeding he was not afforded the right to a jury trial. The trial court denied the motion and found Brown a second felony offender and sentenced him to one hundred ninety-eight years at hard labor without benefit of parole for the armed robbery conviction and a concurrent term of fourteen years for the simple robbery conviction. Brown appealed his sentence as excessive and unconstitutional under *Apprendi*.

The Louisiana Fourth Circuit Court of Appeal affirmed Brown's conviction, but reversed his sentence as violative of *Apprendi*. The State's application for rehearing was denied. The Supreme Court of Louisiana affirmed Brown's sentence, and held that the use of juvenile adjudications obtained without the right to a jury trial as predicate offenses under La. Rev. Stat. 15:529.1 is violative of *Apprendi*. The State's application for rehearing was denied.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

The Supreme Court of Louisiana erred when it ruled that Quincy Brown's sentence for armed robbery, which was enhanced beyond the statutory maximum under a provision of Louisiana's habitual offender statute allowing for sentence enhancement based on prior juvenile adjudications of certain enumerated violent crimes, violated Brown's due process rights because he was not afforded a right to trial in his juvenile proceeding. In so ruling, the Supreme Court of Louisiana erroneously found that the use of juvenile adjudications as predicate crimes for purposes of sentence enhancement do not fall under the pronouncement by this

Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) which exempts "prior convictions" from the general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.

The crucial determination under *Apprendi* is whether the fact used to enhance the sentence is an element of the offense or a sentencing factor. In *Apprendi*, the defendant fired several shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. A New Jersey grand jury returned a 23-count indictment charging the defendant with several offenses; however, none of the counts referred to New Jersey's hate crime statute, and none alleged that he acted with a racially biased purpose. *Apprendi, supra,* 530 U.S. at 469. The defendant eventually pled guilty to three counts, and his sentence was enhanced under New Jersey's hate crimes statute on the ground that he committed the offense with a "biased purpose." *Id.* at 469-470. The judge subsequently concluded that the crime was motivated by racial bias, and he doubled the original sentence. *Id.* at 471.

This Court struck down New Jersey's hate crime statute, which authorized a judge to increase a defendant's maximum sentence if the judge found, by a preponderance of the evidence, that in committing the crime, the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity. In doing so, this Court distinguished an element of a greater offense from a sentencing factor and acknowledged that a criminal defendant is "indisputably" entitled to a "jury determination that [he] is guilty of every element of the crime with which

he is charged, beyond a reasonable doubt. *Id.*. at 477 quoting *United States v. Gaudin*, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995). This Court held that racial bias is an element of the offense that need be charged in the indictment and proved beyond a reasonable doubt to a jury, and that the sentence enhancement violated Apprendi's right to a jury determination of whether he was guilty beyond a reasonable doubt of every element of the crime with which he was charged. *Id.* at 477.

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), likewise, turned on whether the fact upon which the enhancement was based was an element of a greater offense or a sentencing factor. In *Ring*, the jury found the defendant guilty of felony murder occurring during perpetration of an armed robbery. *Ring*, 536 U.S. at 592. Under Arizona law, the defendant was exposed to an enhanced penalty if, at a separate sentencing hearing, further findings of statutorily enumerated "aggravating circumstances" and any "mitigating circumstances" were found by a judge. *Id.* at 592-593. The death sentence could be imposed only if the judge found at least one aggravating circumstance and no substantial mitigating circumstances to warrant leniency. *Id.* at 593. At Ring's sentencing hearing, the judge found two aggravating factors, including a finding that the offense was committed for pecuniary gain, and one mitigating factor, Ring's minimal criminal history. The judge found that the latter did not warrant leniency. *Id.* at 595. On appeal, Ring argued an *Apprendi* violation and this Court held that the findings of aggravating and mitigating factors were findings of fact related to the commission of the offense for which Ring was entitled to a jury determination. *Id.* at 608.

Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999), which preceded the *Apprendi* ruling by a year, also turned on the "determination that a fact is an element of an offense rather than a sentencing consideration." *Jones v. United States*, 526 U.S. at 232 . In *Jones*, the defendant was charged with violating the federal carjacking statute, 18 U.S.C. 2119, which provides that a person possessing a firearm who takes a motor vehicle from the person or presence of another by force or intimidation shall: (1) be imprisoned not more than fifteen years; (2) if serious bodily injury results be imprisoned not more than twenty-five years; and (3) if death results be imprisoned for any number of years up to life. *Id.* at 230. The indictment made no reference to the numbered subsections and charged none of the facts mentioned in the subsections. *Id.* A jury convicted Jones of the charged offense and the trial judge, after determining that one of the victims suffered serious bodily injury, imposed a twenty-five year sentence. Jones objected and argued that serious bodily injury was an element of the offense that had not been pleaded in the indictment or proved to the jury. The court denied the objection. This Court framed the issue as one of statutory interpretation: "Much turns on whether the federal carjacking statute . . . defined three distinct offenses or a single crime with a choice of three maximum penalties, two of them dependent on sentencing factors exempt from the requirements of charge and jury verdict. *Id.* at 232. After analyzing the statute and comparing it to others in which "serious bodily injury" was "unmistakably identified" as an offense element, this Court concluded that the fairest reading of the statute "treats the fact of serious bodily harm as an element, not a mere sentence enhancement. *Id.* at 239.

In this case, it is not an element of Brown's offense that is at issue, but a juvenile adjudication -- a sentencing

factor that does not relate to the commission of the offense. The fact of Brown's prior adjudication, then, need not have been charged in the indictment and proved beyond a reasonable doubt to a jury. The fact of the adjudication was properly determined by a judge at a multiple bill hearing where the State had the burden of proving the elements of Louisiana's habitual offender statute, namely that Brown had been adjudicated in a juvenile proceeding of attempted second degree murder.

Moreover, Brown's adjudication was reliably determined in a proceeding which satisfied constitutional standards, including the right to notice, right to counsel, right to confront and cross-examine witnesses, and the privilege against self-incrimination. As required by this Court in *In re Winship*, 397 U.S. 358, 368, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), a judge, as factfinder, employed the reasonable doubt standard of proof when he found that Brown had violated Louisiana's attempted second degree murder statute.

Brown's adjudication was not subject to a right to trial by jury. This Court has held that fundamental fairness does not require the right to a jury trial in juvenile proceedings. In *McKeiver v. Pennsylvania*, 403 U.S. 528, 29 L. Ed. 2d 647, 91 S. Ct. 1976 (1971), this Court ruled that due process does not require the State to provide jury trials to juveniles and recognized that the use of a jury would "not strengthen greatly, if at all, the factfinding function" and is not constitutionally required. *McKeiver*, 403 U.S. at 547. It implicitly follows, then, that the adjudication counts as a conviction for purposes of subsequent sentence enhancement.

Finally, the ultimate difference between Brown's juvenile proceeding and an adult criminal proceeding

concerns the State's having been afforded the ability to exercise a rehabilitative, rather than retributive remedy after Brown's determination of guilt in the juvenile proceeding. However, that difference did not render the disposition of the juvenile case unreliable.

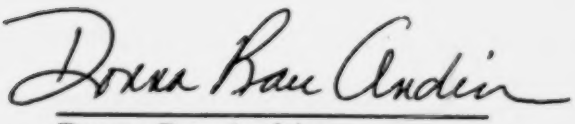
Thus, this Court's *Apprendi* exception necessarily encompassed Brown's juvenile adjudication. The fact of the adjudication did not go toward the commission of Brown's adult offense, and the adjudication was the result of a process in which Brown was afforded all constitutionally required procedural safeguards.

CONCLUSION

The decision of the Supreme Court of Louisiana is contrary to this Court's ruling in *Apprendi*. At issue in this case is an act of recidivism, plainly a sentencing factor and not an element of Brown's offense. Accordingly, the fact of Brown's prior adjudication need not have been charged in the indictment and proved beyond a reasonable doubt to a jury. Consistent with this Court's ruling in *Apprendi*, the fact of Brown's adjudication was properly determined by a judge.

Moreover, Brown's juvenile adjudication was the result of a proceeding in which Brown was afforded all due process protections guaranteed him. The Supreme Court of Louisiana erred when it ruled as unconstitutional the invoking of juvenile adjudications as predicate offenses for purposes of later adult sentence enhancement.

Respectfully submitted,



Donna Rau Andrieu
Assistant District Attorney
State of Louisiana
Orleans Parish
619 South White Street
New Orleans, LA 70119

APPENDIX A

Supreme Court
STATE OF LOUISIANA
New Orleans

PASCAL F. CALOGERO, JR.
CHIEF JUSJICE
JOHN TARLTON OLIVIER
CLERK OF COURT

400 ROYAL STREET
NEW ORLEANS, LA70130
TELEPHONE(504)310-2300
HOME PAGE
http://www.lasc.org

September 3, 2004

Donna R. Andrieu, ADA
619 South White St.
New Orleans, LA. 70119

Re: State of Louisiana
vs.
Quincy Brown
Number 03-K-2788

Dear Counsel:
Enclosed please find a News Release documenting this court's denial of the application for rehearing, in the above entitled referenced case.

With kindest regards, I remain,

Very truly yours,
John Tarlton Olivier
Clerk of Court
/s/ Katherine Fontana
By: Katherine Fontana
Deputy Clerk of Court

KAF: cab
Enclosure
ccs: Eddie J. Jordan, D.A.
Clive Stafford Smith, Esq.
Hon. Kimberly Williamson Butler
Hon. Camille Buras
Stephen 1. Singer, Esq.
Hon. Danielle Schott

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 070

FROM: CLERK OF THE
SUPREME COURT OF LOUISIANA

On the 3rd day of September, 2004, the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

REHEARING (S) DENIED:

2003-C -1016	LINDA BOZEMAN, INDIVIDUALLY AND ON BEHALF OF TOMMY BOZEMAN v. STATE OF LOUISIANA, AND THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT (Parish of Caddo)
2003-K -2788	STATE OF LOUISIANA v. QUINCY BROWN (Parish of Orleans) VICTORY, J., would grant a rehearing. TRAYLOR, J., would grant a rehearing.
2003-C -3436	CURTIS P. MEDINE, INDIVIDUALLY AND MICHAEL BUCK AS TUTOR AND LEGAL GUARDIAN OF JOHN MICHAEL KRAMER, MINOR CHILD OF JANICE BUCK MEDINE v. DR. RICHARD R. RONIGER (Parish of Jefferson) KIMBALL, J., would grant a rehearing. JOHNSON, J., would grant a rehearing. TRAYLOR, J., would grant a rehearing.
2004-C -0066	OCEAN ENERGY, INC. v. PLAQUEMINES PARISH GOV. (Parish of Plaquemines CALOGERO, C.J., would grant a rehearing.
2004-B -0290	IN RE: STEPHEN R. EDWARDS

APPENDIX B

Supreme Court of Louisiana

No. 03-K-2788
July 6, 2004

State of Louisiana
v.
Quincy Brown

KNOLL, Justice.

This criminal case concerns the enhancement of a sentence under Louisiana's Habitual Offender Law; specifically, whether it is constitutionally permissible to use a juvenile adjudication, in which the juvenile had not been afforded the right to a trial by jury, to enhance his sentence for a felony committed when he is an adult. This issue raises the question of whether enhancing the sentence of the defendant on the basis of a prior juvenile adjudication is contrary to *Apprendi v. New Jersey.*[1]

In the present case, when defendant became an adult he committed an armed robbery for which he was convicted by a jury. The sentencing court found defendant a second felony offender as a result of his prior juvenile delinquency adjudication (attempted second-degree murder), and sentenced defendant to 198 years at hard labor without benefit of parole. The court of appeal affirmed his conviction, but reversed his sentence as constitutionally excessive and remanded the case to the trial court for re-sentencing. The court of appeal held the prior juvenile adjudication without the right to a jury trial was constitutionally inadequate under the *Apprendi* exception for

purposes of subsequent sentence enhancement. We granted the State's application for a writ of certiorari[2] to consider this weighty issue of whether the use of juvenile adjudications to enhance a statutory penalty, where the defendant did not have the right to a jury trial, is constitutionally permissible.

FACTS AND PROCEDURAL HISTORY

The facts underlying defendant's charged and prior offenses are not relevant to the issue presented by this writ application, but for the sake of completeness we will briefly summarize the history of the case. After defendant, Quincy Brown, became an adult, he allegedly committed several felony crimes. He was charged by bill of information with two counts of attempted first-degree murder (La.Rev.Stat.14:27(30))[3], one count of armed robbery (La.Rev.Stat.14:64) and one count of simple robbery (La.Rev.Stat.14:65). He pleaded guilty to the simple robbery count and proceeded to trial on the armed robbery charge and the remaining charge of attempted first-degree murder. The jury acquitted defendant of attempted first-degree murder and convicted him of armed robbery. The trial court sentenced him to serve 99 years at hard labor without benefit of parole, probation or suspension of sentence for the armed robbery and to seven years at hard labor with benefits for the simple robbery. The sentences were ordered to run concurrently with credit for time served.

The State then charged defendant as an habitual offender pursuant to La.Rev.Stat. 15:529.1, based on a juvenile adjudication.[4] Defense counsel filed a motion to exclude evidence of the prior adjudication, arguing the use of defendant's juvenile adjudication for purposes of enhancing his sentence under La. Rev. Stat. 15:529.1 is

unconstitutional. The defendant urged the use of the adjudication to enhance the sentence violated *Apprendi*, because in the juvenile proceeding defendant did not have the right to a jury trial. The trial court rejected the motion and found defendant a second felony offender and sentenced him to 198 years at hard labor without benefit of parole for the armed robbery conviction and a concurrent term of 14 years for the simple robbery. Defendant appealed his sentence as excessive and unconstitutional.

A unanimous panel of the appellate court affirmed the conviction, but reversed the sentence as constitutionally excessive. The court of appeal found the trial court erred in enhancing the defendant's sentence on the basis of the prior juvenile conviction. It noted the split in the federal courts of appeal on the issue of whether prior juvenile adjudications, in which the juvenile did not have the right to a jury trial, are constitutionally inadequate under the *Apprendi* exception for purposes of subsequent sentence enhancement. It concluded, based in part on limited guidance from this Court in *State in the Interest of D.J.*,[5] that juvenile adjudications without a right to a jury trial are constitutionally inadequate for purposes of subsequent sentence enhancement. *State v. Brown*, 02-1217, p. 12 (La. Ct.App. 4 Cir. 5/28/03), 853 So.2d 8, 15.

DISCUSSION

Louisiana's Habitual Offender Law is codified at La.Rev.Stat. 15:529.1. In this matter before us, the pertinent language of the statute provides:

> *A.* (1) Any person who, after having been convicted within this state of a felony or *adjudicated a delinquent under Title VIII of*

> *the Louisiana's Children's Code for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous Substances Law involving the manufacture, distribution, or possession with intent to distribute a controlled dangerous substance or a crime of violence as listed in Paragraph (2)*[6] *of this Subsection,* or who, after having been convicted under the laws of any other state or of the United States, or any foreign government of a crime which, if committed in this state would be a felony, thereafter commits any subsequent felony within this state, upon conviction of said felony, shall be punished as follows:
>
> (a) If the second felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life, then the sentence to imprisonment shall be for a determinate term not less that one-half the longest term and not more than twice the longest term prescribed for a first conviction; (Emphasis added).

The italicized language was added in 1994, when the Legislature enacted Act 23 of the Third Extraordinary Session. The digest for that act provided the proposed law would equate an adjudication of delinquency for the commission of a felony-grade violation of either the Louisiana Controlled Dangerous Substances Law or a crime of violence as a conviction for purposes of sentencing as a habitual offender.

Before we reach the issue of whether La.Rev.Stat. 15:529.1 was unconstitutionally applied in violation of the

defendant's Fourteenth Amendment Due Process right, we will first address whether this constitutional issue can be resolved on statutory grounds. We have repeatedly and consistently held that courts should refrain from reaching or determining the constitutionality of legislation unless, in the context of a particular case, the resolution of the constitutional issue is essential to the decision of the case or controversy. *Ring v. State, Dep't of Transp. and Dev.*, 02-1367, p. 4 (La.1/14/03), 835 So.2d 423, 426; *State v. Fleming,* 01-2799, p. *4* (La.6/21/02), 820 So.2d 467, 470. During oral argument of this case, this court noted that subparagraph (a) of La.Rev.Stat. 15:529.1 A(1) did not refer to juvenile adjudications but only referred to convictions, notwithstanding that paragraph A(1) specifically referred to "adjudicated a delinquent." We requested post-argument briefs to address this discrepancy and specifically, whether this discrepancy would have this case resolved upon statutory grounds rather than constitutional grounds.

In post-argument brief, defendant posited because a prior adjudication of delinquency is not a felony, it cannot be used to make the current conviction a second felony under La.Rev.Stat. 15:529.1 A(1)(a). We find a statutory analysis shows notwithstanding the discrepancy in the language, the adult offense was intended to be treated as a "second felony" where the offender had only a prior juvenile adjudication.

It is a well-established tenet of statutory construction that criminal statutes are subject to strict construction under the rule of lenity. *State v. Carr,* 99-2209, p. 4 (La.5/26/00), 761 So.2d 1271, 1274. Thus criminal statutes are given a narrow interpretation and any ambiguity in the substantive provisions of a statute as written is resolved in favor of the accused and against the State. *Id.* However, the rule of strict construction of penal statutes is not to be applied with "such

unreasonable technicality as to defeat the purpose of all rules of statutory construction, which purpose is to ascertain and enforce the true meaning and intent of the statute." *State v. Everett*, 00-2998, p. 12 (La.5/14/02), 816 So.2d 1272, 1279, *reh'g denied*, 6/21/02, quoting *State v. Broussard*, 213 La. 338, 342, 34 So.2d 883, 884 (La.1948). The general rule that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity applies when the court is uncertain about the statute's meaning and is "not to be used in complete disregard of the purpose of the legislature." *Perrin v. United States*, 444 U.S. 37, 49, n. 13, 100 S.Ct. 311, 317, 62 L.Ed.2d 199 (1979). The principle of strict construction "does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature." *United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir.1978), *cert denied*, 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979) (quoting *United States v. Bramblett*, 348 U.S. 503, 510, 75 S.Ct. 504, 508, 99 L.Ed.2d 594 (1955)). A criminal statute, like all other statutes, should be so interpreted as to be in harmony with, preserve, and effectuate the manifest intent of the legislature, and an interpretation should be avoided which would operate to defeat the purpose and object of the statute. *Broussard*, 34 So.2d at 884.

An examination of Act No. 23 clearly reveals the Legislature intended to provide that any person who had been adjudicated a delinquent for certain felony-grade violations was subject to sentence enhancement for a subsequent felony conviction. In order to effectuate this purpose, Act No. 23 did not just amend Louisiana's Habitual Offender Law (La.Rev.Stat.15:529.1), but also amended Children's Code Article 414(A), Code of Evidence Article 609.1(F) and enacted Children's Code Article 412(A)(6). These revisions and enactments were necessary because the

law generally provided that all records concerning proceedings in juvenile court were confidential and not to be disclosed. A reading of the transcript of the meeting of the Senate Committee on Judiciary B, in which House Bill No. 343[7] was discussed, further evidences the Legislature's intent to make juvenile adjudications subject to predicate offenses for felony sentence enhancement.

Considering the extensive revisions the Legislature made to Louisiana law, which not only included the amendment to the Habitual Offender Law but corresponding changes to the Children's Code and the Code of Evidence, it is evident the Legislature's manifest intent was to provide that any person who had been adjudicated a delinquent for certain felony-grade violations was subject to subsequent sentence enhancement for conviction of a felony. Even though Quincy Brown's conviction for armed robbery is technically not a "second felony" because his juvenile adjudication was not a first "felony," an application of the rule of lenity to this ambiguity would be an unreasonable technicality, which would defeat the purpose and object of the statute. To find that the rule of lenity prohibits sentence enhancement where the defendant was adjudicated a delinquent because the felony is not technically a "second" felony simply stretches the general rule of strict construction too far. The Court has a duty to ascertain the intent of the legislature. Under these tenets, the most logical interpretation is to find the statute provides that the felony is subject to enhanced penalties if the defendant had previously been adjudicated a delinquent. Thus we will address the constitutional issue defendant has raised.

The Constitutionality of Non-Jury Juvenile Adjudications as Predicate Offenses

A proper discussion of the constitutional issue before us must commence with the United State's Supreme Court's decision in *Apprendi v. New Jersey, supra.* The question before the Supreme Court was whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. *Apprendi*, 530 U.S. at 469, 120 S.Ct. at 2351. The catalyst for this issue was a New Jersey hate crime statute, which authorized a judge to increase a defendant's maximum prison sentence if the trial court found by a preponderance of the evidence that in committing the crime, the defendant acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity. Charles Apprendi pleaded guilty to two counts of firearm possession for an unlawful purpose and one count of unlawful possession of an antipersonnel bomb. The trial judge imposed an enhanced sentence, finding by a preponderance of the evidence that Apprendi's actions were taken with a purpose to intimidate as provided by the statute. "The question of whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt [was] starkly presented." *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355. The Court declared the answer was foreshadowed by its opinion in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) , construing a federal statute. "We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an

indictment, submitted to a jury, and proven beyond a reasonable doubt.' " *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355, quoting *Jones*, 526 U.S. at 243, n. 6, 119 S.Ct. at 1224. The *Apprendi* court found the Fourteenth Amendment commands the same answer in the case of a state statute. *Apprendi*, 530 U.S. at 476, 120 S.Ct. at 2355.

The Court ruled "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63. It reasoned due process required a jury to find the facts upon which a court based an enhanced sentence as an "element" of the offense at trial, rather than to allow a judge to find those facts by a preponderance of the evidence as a "sentencing factor" at a sentencing hearing. Barry C. Feld, *The Constitutional Tension Between Apprendi and McKeiver: Sentence Enhancements Based on Delinquency Convictions and the Quality of Justice in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1112 (2003). The Court exempted the fact of a prior conviction from its holding because defendants enjoyed criminal procedural safeguards, including the right to a jury trial and proof beyond a reasonable doubt, which assured the accuracy and reliability of the prior record. *Id.*

After *Apprendi*'s holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," courts around the nation have been confronted with the question of whether a juvenile adjudication falls within the *Apprendi* exception for "prior convictions." The federal appellate courts have divided over the use of delinquency adjudications to enhance criminal sentences beyond the

statutorily mandated maximum. The question that has divided the federal circuits is whether a prior juvenile adjudication, in which the juvenile does not have the right to a jury trial, qualifies as a "prior conviction" for purposes of the *Apprendi* exception. In each of these federal cases, the court reviewed the legality of using juvenile adjudications to enhance an adult sentence above a prescribed statutory maximum pursuant to the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Congress has characterized juvenile adjudications as prior convictions under the ACCA. 18 U.S.C. § 924(e)(2)(B), (e)(2)(C).

The Ninth Circuit Court of Appeals became the first court in *Apprendi*'s wake to report a published decision on this issue. Brian Thill, Comment, *Prior "Convictions" Under Apprendi: Why Juvenile Adjudications May Not Be Used to Increase an Offender's Sentence Exposure if They Have Not First Been Proven To a Jury Beyond a Reasonable Doubt*, 87 MARQ. L. REV. 573, 575 (2004) [hereinafter *Prior Convictions*]. In *United States v. Tighe,*[8] a divided panel held *Apprendi*'s narrow "prior conviction" exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt. 266 F.3d at 1194. In reaching this conclusion, the *Tighe* court noted the significant constitutional differences between adult convictions and juvenile adjudications, and inquired into the scope of the term "conviction" as used by the Supreme Court in *Apprendi,* and the cases[9] leading up to *Apprendi*. *Tighe*, 266 F. 3d at 1192-93.

In examining the Supreme Court jurisprudence concerning the use of prior convictions as a sentencing factor, the Tighe court stated:

[I]n *Jones v. United States,* ... [t]he Court explained why the fact of prior convictions was constitutionally distinct from other sentence-enhancing facts, such that it was permissible, under *Almendarez-Torres,* to use prior convictions to increase the possible penalty for an offense without treating them as an element of the current offense: "One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Jones*, 526 U.S. at 249, 119 S.Ct. [at 1227] (emphasis added). Thus, *Jones'* recognition of prior convictions as a constitutionally permissible sentencing factor was rooted in the concept that prior convictions have been, by their very nature, subject to the fundamental triumvirate of procedural protections intended to guarantee the reliability of criminal convictions: fair notice, reasonable doubt and the right to a jury trial.

One year later, in *Apprendi,* the ... Court explained that "the certainty that procedural safeguards attached to the 'fact' of prior conviction" was crucial to *Almendarez-Torres'* constitutional holding regarding prior convictions as sentencing factors. *Apprendi*, 530 U.S. at 488, 120 S.Ct. [at 2362].... "There is a vast difference between accepting the

> validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." *Apprendi*, 530 U.S. at 496, 120 S.Ct. [at 2366].

Tighe, 266 F.3d at 1193-94.

The *Tighe* court found the United States Supreme Court's continued acceptance of *Almendarez-Torres*' holding regarding prior convictions was premised on those convictions being the product of proceedings that afford crucial procedural protections, particularly the right to a jury trial and proof beyond a reasonable doubt. *Tighe*, 266 F.3d at 1194. The court therefore reasoned the "prior conviction" exception to *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. *Id.* The court held juvenile adjudications that do not afford these due process rights do not fall within *Apprendi*'s "prior conviction" exception. *Id.* The Eighth Circuit disagreed with the Ninth Circuit's *Tighe* decision. In *United States v. Smalley,*[10] the court held juvenile adjudications can count as prior convictions for *Apprendi* purposes. 294 F.3d at 1033. The *Smalley* court rejected *Tighe*'s analysis, "conclud[ing] that the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption." *Smalley*, 294 F.3d at 1033.

Noting that juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self incrimination, and that there must be a finding of guilt beyond a reasonable doubt, see *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the court found these safeguards more than sufficient to ensure the reliability *Apprendi* requires. *Smalley*, 294 F.3d at 1033. While *Apprendi* established what procedural safeguards were sufficient (a right to a jury trial and proof beyond a reasonable doubt), and what were not (judge-made findings under a lesser standard of proof), "the Court did not take a position on possibilities that lie in between these two poles." *Id.* at 1032. "[I]t is incorrect to assume that it is not only sufficient but necessary that the 'fundamental triumvirate of procedural protections,' as the Ninth Circuit put it, underly [sic] an adjudication before it can qualify for an *Apprendi* exception." *Id.* The *Smalley* court recognized a jury does not have a role in trials for juvenile offenses, but did not think that fact undermines the reliability of such adjudications in any significant way because the use of a jury in the juvenile context would "not strengthen greatly, if at all, the fact-finding function" and is not constitutionally required. *Id.* at 1033, quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971).

The Third Circuit addressed this issue, considering both the *Tighe* and *Smalley* decisions. *United States v. Jones*, 332 F.3d 688 (3rd Cir.2003), cert denied --- U.S. ----, 124 S.Ct. 1145, 157 L.Ed.2d 1044 (2004). The *Jones* court, like the *Smalley* court, found nothing in *Apprendi* or *Jones v. United States* that required holding prior nonjury juvenile adjudications, where all required due process safeguards were afforded, cannot be used to enhance a sentence under

the ACCA. *Jones*, 332 F.3d at 696. A prior nonjury juvenile adjudication that was afforded all constitutionally-required procedural safeguards can properly be characterized as a prior conviction for *Apprendi* purposes. *Id.* The Supreme Court, in *McKeiver, supra,* held due process does not require providing juveniles with the right to a jury trial. Therefore, the *Jones* court held when a juvenile is adjudicated guilty beyond a reasonable doubt in a bench trial that affords all the due process protections that are required, the adjudication should be counted as a conviction for purposes of subsequent sentencing. *Id.*

Thus, as can be seen, following *Apprendi* there are two reasonable schools of thought on whether juvenile adjudications, in which the juvenile did not have the right to a jury, can properly be characterized as "prior convictions" for felony sentence enhancement purposes.[11] The State, adopting the rationale of the *Smalley* and *United States v. Jones* decisions, argues the defendant was afforded all the safeguards that were constitutionally due in his juvenile proceedings. Therefore, the adjudication was reliable for purposes of the exception under *Apprendi,* and its use as a predicate crime under La.Rev.Stat. 15:529.1 is proper. The defendant contends *Jones v. United States* and *Apprendi* foreclose the use of juvenile adjudications to enhance an adult sentence, where the juvenile did not have the right to a jury trial.[12] In deciding this difficult question, we turn to our recent jurisprudence concerning the juvenile justice system and scholarly works addressing this issue to assist us.

A review of the history of juvenile courts illustrates why juvenile courts have fewer procedural safeguards. The juvenile court movement began near the end of the nineteenth century because "reformers were appalled by adult procedures and penalties, and by the fact that children

could be given long prison sentences and mixed in jails with hardened criminals." Jeremy Hochberg, Note, *Should Juvenile Adjudications Count as Prior Convictions for Apprendi Purposes*?, 45 WM. & MARY L. REV. 1159, 1172 [hereinafter Juvenile Adjudications] (quoting *In re Gault*, 387 U.S. 1, 15, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). The juvenile court movement combined new ideas about children with the new ideology of social control to remove children from the criminal justice system and to provide them with individualized treatment in a separate system. Feld, *supra* at 1138. Under the guise of *parens patriae*, juvenile courts emphasized treatment, supervision, and control rather than punishment, and exercised broad discretion to intervene in the lives of young offenders. Id. Characterizing intervention as a civil or welfare proceeding completed the separation of juvenile from criminal courts and allowed greater authority to control and supervise children. *Id.*

Because of the rehabilitation rationale, the courts justified making the juvenile court less formal. *Juvenile Adjudications*, *supra*, at 1173. Reformers modified courtroom procedures to eliminate any implication of a criminal proceeding, adopted a euphemistic vocabulary, and endorsed a physically separate court building to avoid the stigma of adult prosecutions. Feld, *supra*, at 1138-39. The early reformers "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' ... [t]he child--essentially good, as they saw it--was to be made 'to feel that he is the object of (the state's) care and solicitude,' not that he was under arrest or on trial." *In re Gault*, 387 U.S. 1, 15, 87 S.Ct. 1428, 1437, 18 L.Ed.2d 527 (1967) (citation omitted). The purpose of sanctions would be for therapeutic and rehabilitative purposes, not for retribution or incapacitation. *Prior Convictions, supra*, at 584.

In *In re C.B. et al.*,[13] with Chief Justice Calogero authoring the opinion, we addressed the constitutionality of a statute that authorized the Department of Public Safety and Corrections to transfer juveniles who had been adjudicated delinquent to adult facilities upon reaching age seventeen, to be treated for punitive purposes the same as the convicted adult felons with whom they were confined. We found the statute, La.Rev.Stat. 15:901.1, unconstitutional as applied by Regulation B-02-008 as it denied the juveniles their constitutional right to due process guaranteed them by Article I, § 2[14] of the Louisiana Constitution. *In re C.B.*, p. 6, 708 So.2d at 395. We found it unconstitutional because they received a de facto criminal sentence to hard labor without being afforded the right to trial by jury as mandated by Article I, § 17[15] of our state constitution. *Id.*

In reaching this determination, we noted "the unique nature of the juvenile system is manifested in its non-criminal, or 'civil' nature, its focus on rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in state custody." *Id.* p. 10, 708 So.2d at 396-97 (citing, *inter alia*, *McKeiver, supra*). We reviewed the procedure this Court uses to determine which due process rights are guaranteed to juveniles. In making these determinations, an attempt is made to "strike a judicious balance by injecting procedural orderliness into the juvenile court system ... to reverse the trend whereby 'the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.' " *In re C.B.*, p. 12, 708 So.2d at 398 (quoting *McKeiver*, 403 U.S. at 545, 91 S.Ct. at 1986, quoting *Kent v. United States*, 383 U.S. 541, 556, 86 S.Ct. 1045, 1054, 16 L.Ed.2d 84 (1966)). Based

on the United States Supreme Court's reasoning in *McKeiver*, we previously determined due process and fundamental fairness did not require that the juvenile be granted the right to trial by jury, *State in the Interest of Dino*, 359 So.2d 586, 597-98 (La.1978),[16] even though that right is guaranteed by Article I, § 17 of our state constitution in certain criminal cases. *In re C.B.*, p. 13, 708 So.2d at 398 (emphasis in original). In *McKeiver,* the Supreme Court determined the Sixth Amendment of the Federal Constitution did not apply in juvenile adjudications because the juvenile proceeding had not yet been held to be a "criminal prosecution" within the meaning and reach of the Sixth Amendment. *McKeiver*, 403 U.S. at 541, 91 S.Ct. at 1984. Among the reasons the Court gave for finding jury trials in juvenile proceedings are not constitutionally required was the imposition of a jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function and would tend to place the juvenile squarely in the routine of the criminal process, *Id.* at 547, 91 S.Ct. at 1987, from which juveniles had been removed by the reforms of the late nineteenth century. The Court was reluctant to give up on the promise of the juvenile system concept and in the belief the system could still accomplish its rehabilitative goals. *Id.*

Therefore when we were confronted with the constitutionality of the application of a statute that allowed adjudicated juveniles to be transferred to adult facilities, we found the statute unconstitutional as applied, holding the statute through its corresponding regulation had sufficiently tilted the scales away from a "civil" proceeding, with its focus on rehabilitation, to one purely criminal. *In re C.B.*, p. 17, 708 So.2d at 400. Due process and fundamental fairness required that the juvenile have a jury trial if he or she was to be incarcerated at hard labor in an adult penal facility. Id.

The determination in *McKeiver* that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated delinquent. *In re C.B.*., p. 14, 708 So.2d at 399. "It therefore stands to reason that if the civil trappings of the juvenile adjudication are sufficiently subverted, then a proceeding without that safeguard is fundamentally unfair, and thus, violative of due process." *Id.* "The hallmark of special juvenile procedures is their non-criminal nature." *Id.*, p. 17, 708 So.2d at 400.

We recently had cause to re-visit the issue of the right to jury trials in our juvenile justice system in *State in the Interest of D.J., supra.* There we reaffirmed our holding in *State in the Interest of Dino,* denying juveniles a constitutional right to a jury trial in delinquency proceedings. State in the Interest of D.J., p. 9, 817 So.2d at 32. The juveniles and the amici argued the policy-based analysis applied when *McKeiver* and *Dino* were decided was outdated. *Id.* p. 7, 817 So.2d at 30. They contended, *inter alia*, the amendment to the Habitual Offender Law to allow use of juvenile adjudications to enhance subsequent adult felony offenses had torn down the remaining characteristics of what traditionally identified the juvenile system.[17]

We noted we had specifically discussed these amendments in *In re C.B.* We found our holding in *In re C.B.* "significant, because it infers that the Court determined that the other statutes that 'blurred the distinction' between adult and juvenile proceedings, such as the public hearing and the sentence enhancement statutes, did not offend due process requirements to such an extent that a jury trial would be required." *State in the Interest of D.J., p. 10, 817 So.2d at 33.* However, in finding continued viability in our Dino holding that due process does not afford a juvenile the right

to a jury trial in a delinquency adjudicatory proceeding, we found further support in the fact that "notwithstanding the changes in the juvenile system ... there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." *State in the Interest of D.J.*, p. 10, 817 So.2d at 33.

Notwithstanding our finding in *State in the Interest of D.J.*, where we inferred the sentence enhancement statutes did not offend due process requirements to such an extent that a jury trial would be required in juvenile adjudicatory proceedings, we find because juveniles do not have a right to a jury trial in these proceedings, juvenile adjudications cannot be used to enhance adult felony convictions pursuant to La.Rev.Stat. 15:529.1. We have well established that juvenile adjudications in Louisiana are sufficiently reliable, even without a jury trial, to support dispositions within the juvenile justice system. However, *Apprendi* has raised the issue of whether these adjudications, rendered without the right to a jury trial, are sufficiently reliable to support enhanced sentencing for adults. For the reasons that follow, we find they are not.

Under the guise of *parens patriae*, juvenile courts emphasize treatment, supervision, and control rather than punishment. Feld, supra, at 1138. The hallmark of special juvenile procedures is their non-criminal nature. *In re C.B.*, p. 17, 708 So.2d at 400. Our state's juvenile system was founded upon the premise that retributive punishment was deemed inappropriate and the juvenile system dispositions should be individually tailored to address the needs and abilities of the juvenile in question. *Id.*, p. 8, 708 So.2d at 395-96. Because of the unique nature of the juvenile system manifested in its non-criminal or "civil" nature, its focus on

rehabilitation and individual treatment rather than retribution, and the state's role as *parens patriae* in managing the welfare of the juvenile in its custody, the United States Supreme Court held, despite disappointments, failures and shortcomings in the juvenile court system, juveniles were not constitutionally entitled to jury trials. *McKeiver*, 403 U.S. at 545, 91 S.Ct. at 1986.

Even though it was argued that because (1) the juvenile justice system had taken on more of the trappings of the criminal justice system; (2) the role of punishment had increased in the juvenile system; and (3) the legislative amendments opening the proceedings to the public and allowing juvenile adjudications to serve as predicate offenses for adult felony sentence enhancement, due process required juveniles receive a jury trial, we continued to uphold *Dino*'s decree that Art. I, § 2 of our State Constitution does not afford a juvenile the right to a jury trial in a juvenile proceeding. *State in the Interest of D.J.*, p. 13, 817 So.2d at 34. Among our reasons for our continued holding is that even with the changes in the juvenile justice system, "there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." *Id.* p. 10, 817 So.2d at 33. To allow these adjudications to serve as "prior convictions" for purposes of sentence enhancement for adult felony offenses would lessen this disparity and contribute to "blurr[ing] the distinction between juvenile and adult procedures." *In re C.B.*, p. 8, 708 So.2d at 396.

We find there is a difference between a "prior conviction" and a prior juvenile adjudication, and we believe the *Tighe* decision more closely comports with the rationale for finding juveniles are not constitutionally entitled to a jury trial. A "prior conviction must itself have been established

through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees." *Tighe*, 266 F.3d at 1193 (quoting *Jones v. United States*, 526 U.S. at 249, 119 S.Ct. at 1227). Our holdings that due process does not require juveniles be afforded all the guarantees afforded adult criminals under the constitution have been premised upon the "civil nature" of a juvenile adjudication, its focus on rehabilitation and the state's role as *parens patriae*. If a juvenile adjudication, with its lack of a right to a jury trial which is afforded to adult criminals, can then be counted as a predicate offense the same as a felony conviction for purposes of Louisiana's Habitual Offender Law, then "the entire claim of *parens patriae* becomes a hypocritical mockery." *In re C.B.*, p. 17, 708 So.2d at 400 (quoting *Londerholm v. Owens*, 197 Kan. 212, 416 P.2d 259, 269 (1966)).

A juvenile adjudication is not a conviction of any crime. *In re C.B.*, p. 17, 708 So.2d at 400. Therefore, this adjudication should not be counted as a "prior conviction" for *Apprendi* purposes. The determination that a jury trial was not constitutionally required in juvenile adjudications was predicated upon the non-criminal treatment of the adjudicated juvenile delinquent. *Id.* p. 14, 708 So.2d at 399. It would be incongruous and illogical to allow the non-criminal adjudication of a juvenile delinquent to serve as a criminal sentencing enhancer.[18] To equate this adjudication with a conviction as a predicate offense for purposes of the Habitual Offender Law would subvert the civil trappings of the juvenile adjudication to an extent to make it fundamentally unfair and thus, violative of due process. In order to continue holding a trial by jury is not constitutionally required, we cannot allow these adjudications, with their civil trappings, to be treated as predicate offenses the same as felony convictions. It seems

contradictory and fundamentally unfair to provide youths with fewer procedural safeguards in the name of rehabilitation and then to use adjudications obtained for treatment purposes to punish them more severely as adults. Feld, supra, at 1194. It is inconsistent to consider juvenile adjudications civil for one purpose and therefore not constitutionally entitled to a jury trial, but then to consider them criminal for the purpose of classifying them as "prior convictions," which can be counted as predicate offenses for purposes of the Habitual Offender Law.

We do not agree with the *Smalley* court and its progeny that because the procedures of juvenile adjudications are sufficiently reliable for juvenile dispositions, they are therefore reliable to "justify the much harsher consequences of their use as criminal sentence enhancements." *Feld, supra*, at 1190. We find, as did the *Tighe* court, the guidance from our United States Supreme Court indicates recidivism is distinct as a sentencing factor and therefore as an exception to the general rule that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt[,]" *Apprendi*, 530 U.S. at 490, 120 S.Ct. at 2362-63, because "unlike virtually any other consideration used to enlarge the possible penalty for an offense, ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones v. United States*, 526 U.S. at 249, 119 S.Ct. at 1227 (emphasis added). Because a juvenile adjudication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from *Apprendi's* general rule; the use of these adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right guaranteed by the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, we find it is unconstitutional to apply La.Rev.Stat. 15.529.1 for the purpose of allowing juvenile adjudications to be counted as predicate offenses, where these adjudications were obtained without the right to a jury trial. In our view, the use of such adjudications violates *Apprendi*'s narrow exception, which exempts only "prior convictions" from its general rule that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Although these adjudications can be reliably and constitutionally obtained without the right to a jury trial, this is because the juvenile proceeding is a "civil" proceeding with a focus on rehabilitation and non-criminal treatment of the adjudicated delinquent. "Prior convictions" are excepted from the *Apprendi* holding because they were the product of proceedings that afforded crucial procedural protections--particularly fair notice, the right to jury trial and proof beyond a reasonable doubt.

DECREE

The judgment of the appellate court is affirmed for the reasons expressed herein. We reverse the sentence as unconstitutional, as it violates the defendant's due process rights. The case is remanded to the trial court for re-sentencing consistent with the views expressed in this opinion.

AFFIRMED.

VICTORY, J., dissents for the reasons assigned by TRAYLOR,
TRAYLOR, J., dissents and assigns reasons.

TRAYLOR, Justice, dissenting.

I disagree with the majority's interpretation of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and believe that a fair reading of Apprendi does not require this court to preclude the use of a juvenile adjudication to enhance an adult criminal sentence. In my opinion, *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002), and *United States v. Jones*, 332 F.3d 688 (3rd Cir.2003), reliance on *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971), which held that the right to a jury trial is not required to fulfill the fundamental fairness due process standard in a juvenile proceeding, is dispositive in this case. Accordingly, I would hold that it is constitutionally permissible to use a juvenile adjudication to enhance an adult criminal sentence where the juvenile adjudication comports with the requirements of fundamental fairness as set out in *McKeiver*: notice, counsel, confrontation, cross-examination, and standard of proof.

---

[1] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[2] *State v. Brown*, 03-2788 (La.2/6/04), 866 So.2d 805.

[3] The State later entered a *nolle prosequi* to one of the attempted murder counts.

[4] Previously the defendant was adjudicated a delinquent for attempted second-degree murder.

[5] 01-2149 (La.5/14/02), 817 So.2d 26. The appellate court found a footnote in *State in the Interest of D.J.*, strongly hinted the difference in adjudication procedures might require the exclusion of such adjudications from later enhancement proceedings. *Brown*, p. 11, 853 So.2d at 15. Addressing the fact that before the amendment to the Habitual Offender Law allowing adjudications to enhance subsequent felony offenses, juvenile adjudications were sealed and did not follow an individual into adulthood, we noted:

In *United States v. Tucker*, 404 U.S. 433, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court prohibited the use of prior convictions that were entered without the advice of counsel to enhance later sentences. In a related vein, some commentators suggest that the practice of using juvenile convictions obtained without the option to be tried by a jury to enhance adult sentences renders the juvenile justice system unconstitutional. See e.g., Sara E Kropf, Note, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 Geo. L.J. 2149 (1999); David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 Minn. L.Rev. 1769, 1793-94 (1991). *State in the Interest of D.J.*, p. 8, 817 So.2d at 39, n. 6.

[6] Paragraph 2 lists the following crimes: attempted first-degree murder; attempted second-degree murder; manslaughter; armed robbery; forcible rape; simple rape; second-degree kidnapping; a second or subsequent aggravated battery; a second or subsequent aggravated burglary; and a second or subsequent offense of burglary of an inhabited dwelling.

[7] House Bill No. 343 was subsequently enrolled as Act No. 23, 3rd Extraordinary Session, 1994.

[8] 266 F.3d 1187 (9th Cir.2001). leading up to *Apprendi. Tighe*, 266 F.3d at 1192-93.

[9] The United States Supreme Court first held that prior convictions could be treated as sentencing factors that raise the maximum penalty of an offense in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). *Almendarez-Torres* involved a statute that authorized a maximum prison sentence of two years for an alien who returned to the United States despite previous deportation, but a maximum sentence of twenty years if the initial deportation was subsequent to a conviction for an aggravated felony. The defendant argued the fact of his prior conviction, which was used to increase the statutorily mandated maximum punishment, was an element of his offense and should have been charged in the indictment. The question

before the Court was "whether this latter provision defines a separate crime or simply authorizes an enhanced penalty." *Id.* at 226, 118 S.Ct. at 1222. The Court held it to be a penalty provision, "which simply authorizes a court to increase the sentence for a recidivist. It does not define a separate crime." *Id.*

The next term in *Jones v. United States, supra,* the Court considered *Almendarez-Torres's* holding regarding the use of prior convictions in the context of emerging concerns about the viability of using facts not charged in the indictment nor proved to a jury beyond a reasonable doubt to increase the statutory maximum penalty to which a defendant is exposed. In *Jones,* the defendant was charged with carjacking in violation of 18 U.S.C. § 2119, which provides that a person possessing a firearm who takes a motor vehicle from the person or presence of another by force or intimidation shall: 1) be imprisoned not more than fifteen years; 2) if serious bodily injury results be imprisoned not more than 25 years; and 3) if death results be imprisoned for any number of years up to life. The indictment made no reference to the numbered subsections and charged none of the facts mentioned in the latter two. Defendant was told at the arraignment that he faced a maximum 15 year sentence for carjacking, and the jury instructions at his trial defined that offense by reference solely to § 2119(1). The trial judge, after determining that one of the victims suffered serious bodily injury, imposed a 25 year sentence. The defendant argued that serious bodily injury was an element of the offense that had neither been pleaded in the indictment nor proven to the jury. The United States Supreme Court held the carjacking statute established three separate offenses by the specification of distinct elements, each of which must be charged by indictment and proven to a jury beyond a reasonable doubt. *Jones v. United States*, 526 U.S. at 252, 119 S.Ct. at 1228.

[10] 294 F.3d 1030 (8th Cir.2002), *cert denied* 537 U.S. 1114, 123 S.Ct. 870, 154 L.Ed.2d 790 (2003).

[11] We have found the sole state supreme court addressing this issue is Kansas. That court was presented with the question of whether the absence of the jury trial safeguard in juvenile adjudications was enough to remove it from the narrow exception for prior convictions built into the *Apprendi* rule. *State v. Hitt*, 273 Kan. 224, 42 P.3d 732, 736 (2002), *cert. denied* 537 U.S. 1104, 123 S.Ct. 962, 154 L.Ed.2d 772 (2003). It held juvenile adjudications are included within the historical cloak of

recidivism and enjoy ample procedural safeguards and therefore, are encompassed within the *Apprendi* exception. *Id.* at 740.

[12] Additionally, the defendant strenuously argues a majority on the United States Supreme Court appears to have moved rapidly away from the position taken in *Almendarez-Torres* that recidivism "does not relate to the commission of the offense, but goes to the punishment only, and therefore ... may be subsequently decided [by a judge]." 523 U.S. at 244, 118 S.Ct. at 1231. We decline the invitation to speculate as to what the Court's position is, or may become, on treating recidivism as a factor in sentence enhancement, and restrict ourselves to the guidance thus far provided by the Court's holdings.

[13] 97-2783 (La.3/4/98), 708 So.2d 391.

[14] Article I, § 2 provides: "No person shall be deprived of life, liberty, or property, except by due process of law."

[15] Article I, § 17 of the Louisiana Constitution is our state counterpart to the Sixth Amendment of the Federal Constitution which grants the right to trial by jury to certain criminal defendants.

[16] *cert. denied*, 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978), rev'd on other grounds, *State v. Fernandez*, 96-2719 (La.4/14/98), 712 So.2d 485.

[17] The other legislative amendment argued to have torn down the remaining characteristics of what traditionally identified the juvenile system was the amendment to La. Ch.Code art. 407(A), opening to the public all proceedings in juvenile delinquency cases involving crimes of violence.

[18] While we note sentencing courts frequently refer to and consider a defendant's juvenile record when imposing a statutory sentence for a proscribed crime, that is not the same as counting these adjudications as predicate offenses for the purpose of imposing the harsher mandatory sentence required by Louisiana's Habitual Offender Law.

APPENDIX C

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

September 09, 2003

The following action was taken on applications for rehearing:

* * * * * *

2002-KA-1217 **REHEARING DENIED**
STATE OF LOUISIANA vs
QUINCY BROWN
(Byrnes, Love, **Lombard**)

APPENDIX D

Court of Appeal of Louisiana
Fourth Circuit

No. 2002-KA-1217
May 28, 2003

State of Louisiana
v.
Quincy Brown

EDWIN A. LOMBARD, Judge.

STATEMENT OF CASE

On May 10, 1999, Quincy Brown was charged by bill of information with a violation of La. R.S. 14:27(30), relative to the attempted first degree murder of Alvin Harris on March 17, 1999 (Count One); a violation of *La. R.S. 14:64*, relative to the March 11, 1999 armed robbery of Wayne Matthews (Count Two); a second violation of La. R.S. 14:27(30), relative to the February 7, 1999 attempted first degree murder of Leonard Jordan (Count Three); and a violation of La. R.S. 14:65, relative to the March 15, 1999 simple robbery of Yul Knighten (Count Four). Mr. Brown's case was received in Section "F" and transferred to Section "H" on May 14, 1999 to follow Case No. 406-784 in which he was charged with first degree murder.[1]

Mr. Brown pled not guilty at the arraignment on May 27, 1999. On August 6, 1999, the trial court heard testimony

on defendant's motion to suppress the identification in Counts Two and Four (the armed robbery and simple robbery charges). The court denied the motion on count two and left the matter open as to Count Four. On August 18, 1999, defendant filed a motion to quash the indictment or, alternatively, to sever the counts in the indictment. The court heard testimony on defendant's motion to suppress the identification on the remaining counts and continued the matter. On October 15, 1999, the court resumed the suppression hearing on the motions to suppress identification. The trial court denied the motion to suppress as to Count Three, and the court denied the motion as to Count One and Four as moot. The court also denied the motion to quash or to sever the counts. The writ was denied by this court and similarly denied by the Louisiana Supreme Court.

On October 15, 1999, the trial court, after hearing, denied Mr. Brown's Motion to Suppress the Identification with respect to Count Three, and denied in part the Motion to Suppress the Identification with respect to Count Four. On July 28, 1999, the trial court granted defendant's ex parte Motion for Appointment of Second Counsel naming Harold Ducloux as second counsel, who represented Mr. Brown on July 28, 1999 and through sentencing. Mr. Brown was also represented by Dwight Doskey of the Orleans Indigent Defender Program.

On November 9, 1999, defense counsel Marie Scavetta filed a motion to compel disclosure. On December 14, 1999 the court heard testimony on discovery matters and defendant reurged the motion for severance. On January 13, 2000, the trial court granted attorney Marie Scavetta a motion to withdraw as counsel and granted attorney Stephen Singer's motion to appear pro hac vice in the matter. On February 8, 2000, defendant filed a second motion to quash the indictment

or, in the alternative, for severance. On March 1, 2000, the court heard argument, and the trial court denied the motion. Defendant filed a notice of intent to seek writs and to stay the proceedings. The trial court denied the motion for stay. On May 3, 2000, this court denied defendant's writ application on the showing made. *State v. Brown*, 2000-0560, *unpub.* (La.App. 4 Cir. 5/3/00), *stay denied*, 2000-1249 (La.5/3/00), 760 So.2d 1184, *writ denied*, 2000-1584 (La.6/30/00), 767 So.2d 42.

On January 26, 2001, the trial court granted the State's motion to remove Mr. Singer from representation in the first degree murder case and appointed Clive Stafford Smith, also of the Louisiana Crisis Assistance Center, to represent Mr. Brown. Apparently, there was some confusion over whether Mr. Singer had been removed from this case. A hearing on the issue was conducted May 4, 2001 after which Mr. Smith enrolled as counsel. Defendant sought review in this court regarding the removal of Stephen Singer as co-counsel and this court found that while there was nothing to indicate that Mr. Singer had been removed from the instant case in January, this court found on the basis of its previous ruling in an unrelated writ, *State v. Landry*, 2000-2414, *unpub.* (La.App. 4 Cir. 1/9/01), that he should be removed because his presence in Louisiana courts practicing as an out-of-state attorney had been ongoing for so long that he was no longer qualified to appear pro hac vice. *State v. Brown*, 2001-0875, *unpubl.* (La.App. 4 Cir. 6/01/01). Defendant sought review in the Louisiana Supreme Court, and the court remanded the case to allow Mr. Singer to demonstrate that he was "temporarily present in this state" and whether he possessed the professional competence and ethical responsibility of an attorney admitted to practice in Louisiana. *State v. Landry*, 2001-1641, 2001-0875 (La.6/29/01), 791 So.2d 630. Thereafter, defendant filed a motion to recuse Judge Buras. The motion was denied on

July 13, 2001. This court denied defendant's writ. *State v. Brown*, 2001-1418, *unpub.* (La.App. 4 Cir. 8/15/01). On August 9, 2001, defendant filed a motion to stay the hearing on Mr. Singer pending the outcome of the bar examination.

On May 4, 2001, the trial court granted the State's motion to remove Mr. Singer as counsel of record. On May 4, 2001, Clive Stafford Smith enrolled as Mr. Brown's counsel, replacing Mr. Singer as co-counsel.

On September 28, 2001, defendant filed a motion to preclude exclusion of jurors. Prior to trial, Leonard Jordan was held on a material witness bond. On October 2, 2001, Mr. Brown withdrew all former pleas regarding Count Four and entered a plea of "guilty as charged" of the simple robbery of Yul Knighten. The case then proceeded to trial, and the jury, on October 3, 2001, found the defendant guilty as charged of the armed robbery of Wayne Matthews (Count Two) and not guilty of the attempted murder of Leonard Jordan (Count Three). The State entered a *nolle prosequi* with regard to Count One, the attempted first degree murder of Alvin Harris.

On January 18, 2002, the trial court sentenced the defendant to serve 99 years at hard labor without benefit of parole. The defendant objected to the sentence as excessive. On June 21, 2002, the court found the defendant to be a second felony offender and sentenced him to 198 years at hard labor without benefit of parole. The defendant objected to the sentence as excessive. The court granted his motion for appeal.

STATEMENT OF FACT

Wayne Matthews testified that on March 11, 1999, he was the victim of an armed robbery. Mr. Matthews was in his car when the defendant entered. Initially, he believed that the

defendant was joking. He tried talking to the defendant for some ten minutes as he slowly drove his car. Mr. Matthews related that he knew Mr. Brown, as he had previously been introduced to him and that Mr. Brown was frequently at the house of a female friend of his. Mr. Matthews did not see the gun until the defendant was about to exit the car. After Mr. Matthews saw the gun, Mr. Brown asked him for his wallet. Mr. Matthews gave him the wallet and then ran. As he ran he heard a shot and then heard his car being driven off.

Mr. Matthews returned home and called the police. Sometime later, after the police had failed to arrive, Mr. Matthews called again. The two 911 tapes were played for the jury. In the second tape, Mr. Matthews identified his assailant as "Quincy." Mr. Matthews positively identified the defendant in court as the man who had robbed him.

Officer Henry Hollins arrived at the victim's house that night to take a report. Officer Hollins stated that Mr. Matthews identified the perpetrator as someone known to him by the name of Quincy. The officer and Mr. Matthews proceeded to the location of the robbery. Officer Hollins attempted to locate a shell casing but was unsuccessful. While the two were in the area, Mr. Matthews observed his car drive by with two subjects in it. Officer Hollins and Mr. Matthews pursued the vehicle and the two subjects were apprehended. Mr. Matthews stated that neither subject was the perpetrator of the armed robbery.

The day after the robbery, a friend of Mr. Matthews discovered a crack pipe underneath the seat of his car. Mr. Matthews telephoned the police to inform them of his discovery. He related that he was told to throw the pipe away, which he did.

Detective John Duzac testified that he was assigned to conduct the follow up investigation of Mr. Matthews' robbery. He compiled a photographic lineup and presented the photos to Mr. Matthews for identification. Mr. Matthews identified the defendant and signed and dated the back of the photograph.

Sergeant Gus Bethea testified that on February 7, 1999 he assisted in the investigation of a shooting in the Fischer Housing Project. Sergeant Bethea related that three males had been shot and that one had suffered a serious gunshot wound to the throat. Sergeant Bethea related that the other two victims were uncooperative.

Leonard Jordan testified that he was the victim of the shooting which occurred on February 7, 1999. He stated that he had been shot in the jugular and that he had sustained paralysis in the left hand. Mr. Jordan had been at a club that night and had gotten a ride with several people in a van. He recalled getting out of the car in the Fischer Housing Project, but he stated that he could not recall what happened afterwards. Mr. Jordan testified that he had no knowledge of who had shot him that night. He stated that he had blanked out any memory of the shooting from his mind. Mr. Jordan examined a photographic lineup bearing his purported signature on the back of a photograph of the defendant and stated that he was not sure whether that was his signature, although he acknowledged it was similar. He stated that he could not remember whom he had identified. Mr. Jordan acknowledged that he and the defendant were acquaintances.

ERRORS PATENT

A review of the record for errors patent reveals none.

ANALYSIS

Excessive Sentence

Defendant challenges the constitutionality of his multiple offender adjudication and asserts that his sentence is excessive. Citing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *United States v. Tighe*, 266 F.3d 1187 (9th Cir.2001), defendant contends that the federal jurisprudence supports the conclusion that a juvenile conviction in which the defendant has not been afforded the right to a trial by jury cannot be used to enhance a defendant's sentence.

The Supreme Court in *Apprendi* stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S.Ct. 2348. The Court in *Apprendi* elaborated on the importance of procedural protections being inherent in prior convictions used as sentencing factors to increase statutory penalties:

> There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing a judge to find the required fact under a lesser standard of proof.

Apprendi, 530 U.S. at 496, 120 S.Ct. 2348.

Apprendi was convicted pursuant to a guilty plea of two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful

possession of an antipersonnel bomb. The two offenses carried a penalty range of between three to ten years. Additionally, however, the State reserved the right to enhance the sentence under the hate crime statute on the ground that the shooting was committed with a biased purpose. The hate crime statute authorized an extended term of between 10 and 20 years. The issue before the Supreme Court was whether the Due Process Clause of the Fourteenth Amendment required that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt. The Court reversed the New Jersey Supreme Court's judgment, which had affirmed the enhancement of the prison sentence within the extended range. The United States Supreme Court held that because Apprendi did not receive a jury trial under the prescribed standard of proof, his sentence violated his constitutional due process rights. In *Apprendi,* however, the Court did not address the issue of prior juvenile adjudications.

As background, Congress has characterized juvenile adjudications as "prior convictions" under the Armed Career Criminal Act of 1984 ("ACCA"), 18 U.S.C. § 924(e)(2)(B), (e)(2)(C). But, whether juvenile convictions can be characterized as "prior convictions" under a due process review as mandated by *Apprendi* is a constitutional question; i.e., the defendant's right not to be deprived of his liberty without due process of law.

In *Tighe, supra*, the U.S. Ninth Circuit Court of Appeals applied *Apprendi's* holding to prior juvenile convictions. The Court in *Apprendi* had concluded that the " 'prior conviction' exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt" and the Ninth Circuit concluded, as a result, that the "prior conviction"

exception does not include nonjury, juvenile adjudications. 266 F.3d at 1194.

In arriving at its conclusion, the Ninth Circuit in *Tighe* reviewed additional United States Supreme Court jurisprudence noting that neither *Apprendi* nor *Almendarez-Torres, infra,* specifically addressed the unique issues distinguishing juvenile convictions from adult convictions. Specifically, in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), the Supreme Court held that the fact of the prior conviction was a sentencing factor, and not a separate element of the crime to be charged in the indictment. *Id.* at 243, 118 S.Ct. 1219. Subsequently, during the next term, the Court in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), considered its holding in *Almendarez-Torres* regarding the use of prior convictions in the context of emerging concern regarding the use of certain facts to increase the defendant's exposure to a statutory penalty not charged in the indictment nor proved beyond a reasonable doubt before a jury. The Court explained the distinction between prior convictions as opposed to other sentencing-enhancing facts as follows:

> One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense ... a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt and jury trial guarantees.

Jones, 526 U.S. at 249, 119 S.Ct. 1215 (emphasis added).

The Ninth Circuit in *Tighe* focused on the Supreme Court's emphasis in *Apprendi* (quoted above from *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348), which followed *Jones* in the 2000 term, stressing the necessity for the procedural mechanisms of a jury trial and the standard of beyond a reasonable doubt when increasing the statutory maximum of a sentence. The appellate court concluded:

> Thus, as we read *Jones* and *Apprendi*, the "prior conviction" exception to *Apprendi's* general rule must be limited to prior convictions that were themselves obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt. Juvenile adjudications that do not afford the right to a jury trial and a beyond-a-reasonable-doubt burden of proof, therefore, do not fall within *Apprendi's* "prior conviction" exception.
>
> ...
>
> In sum, we conclude *Apprendi's* narrow "prior conviction" exception is limited to prior convictions resulting from proceedings that afforded the procedural necessities of a jury trial and proof beyond a reasonable doubt.

Tighe, 266 F.3d at 1194.

Not all federal appellate courts have concluded similarly, however. In *United States v. Smalley*, 294 F.3d 1030 (8th Cir.2002) the identical issue was raised, and the court declined to follow *Tighe*, writing:

> We respectfully disagree with the *Tighe* court's conclusion. The Supreme Court stated in

Apprendi that prior convictions are excluded from the general rule because of the "certainty that procedural safeguards," such as trial by jury and proof beyond a reasonable doubt, undergird them. *Apprendi*, 530 U.S. at 488, 120 S.Ct. 2348. The Court went on to state that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt," on the one hand, and accepting the validity of findings of facts by judges that are subject to a lesser standard of proof, on the other. *Id.* at 496, 120 S.Ct. 2348. We think that while the Court established what constitutes sufficient procedural safeguards (a right to jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles. In other words, we think that it is incorrect to assume that it is not only sufficient but necessary that the "fundamental triumvirate of procedural protections," as the Ninth Circuit put it, underly an adjudication before it can qualify for the *Apprendi* exemption.

We do not think, moreover, that *Jones* meant to define the term "prior conviction" for constitutional purposes as a conviction "that has been established through procedures satisfying fair notice, reasonable doubt and jury trial guarantees." 526 U.S. at 249, 119 S.Ct. 1215. We read *Jones* instead to mean that if prior

convictions result from proceedings outfitted with these safeguards, then they can constitutionally be used to increase the penalty for a crime without those convictions being submitted and proved to a jury. Our confidence in this reading is bolstered by the fact that in explaining the exception for prior convictions, the *Apprendi* court itself talks about only the right to a jury trial and proof beyond a reasonable doubt. We think it notable, moreover, that *Apprendi* does not even refer to the language in *Jones*, quoted above, upon which the *Tighe* court based its conclusion.

In any case, we conclude that the question of whether juvenile adjudications should be exempt from *Apprendi's* general rule should not turn on the narrow parsing of words, but on an examination of whether juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption. We believe that they are.

For starters, juvenile defendants have the right to notice, the right to counsel, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. See *In re Winship*, 397 U.S. 358, 368, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A judge in a juvenile proceeding, moreover, must find guilt beyond a reasonable doubt before he or she can convict. See id. We think that these safeguards are more than sufficient to ensure the reliability that *Apprendi* requires. This conclusion finds at least some support in those cases, in both our circuit

> and the Ninth Circuit, that hold that juvenile sentences may be used to enhance a defendant's sentence within a prescribed statutory range. See *United States v. Early*, 77 F.3d 242, 244-45 (8th Cir.1996) (per curiam); *United States v. Williams*, 891 F.2d 212, 214-15 (9th Cir.1989), *cert. denied*, 494 U.S. 1037, 110 S.Ct. 1496, 108 L.Ed.2d 631 (1990). Finally, while we recognize that a jury does not have a role in trials for juvenile offenses, we do not think that this fact undermines the reliability of such adjudications in any significant way because we think that the use of a jury in the juvenile context would "not strengthen greatly, if at all, the fact-finding function" and is not constitutionally required. See *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion).
>
> We therefore conclude that juvenile adjudications can rightly be characterized as "prior convictions" for *Apprendi* purposes, and that the district court did not err in increasing Mr. Smalley's sentence based on his prior juvenile adjudications.

Smalley, 294 F.3d at 1030-32.

Although federal jurisprudence is merely persuasive, the underlying rationale is instructive. The Louisiana Supreme Court has yet to deal squarely with the issue of whether the use of juvenile adjudications to enhance a statutory penalty is constitutionally permissible. Recently, however, the Louisiana Supreme Court addressed the question of whether the juvenile should be allowed a trial by jury and other similar rights. See

State in the Interest of D.J., 01-KA-2149 (La.5/14/02), 817 So.2d 26. Our supreme court concluded that such rights need not be permitted in juvenile proceedings, but strongly hinted that this difference in adjudication procedures might require the exclusion of such adjudications from later enhancement proceedings:

> In *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court prohibited the use of prior convictions that were entered without the advice of counsel to enhance later sentences. In a related vein, some commentators suggest that the practice of using juvenile convictions obtained without the option to be tried by a jury to enhance adult sentences renders the juvenile system unconstitutional. See e.g., Sara E. Kropf, Note, *Overturning McKeiver v. Pennsylvania: The Unconstitutionality of Using Prior Convictions to Enhance Adult Sentences Under the Sentencing Guidelines*, 87 Geo. L.J. 2149 (1999); David Dormont, Note, *For the Good of the Adult: An Examination of the Constitutionality of Using Prior Juvenile Adjudications to Enhance Adult Sentences*, 75 Minn. L.Rev. 1769, 1793-94 (1991).

Id. at p. 4, n. 6; 817 So.2d at 37, n. 6.

We conclude that the rationale articulated by the Ninth Circuit in *Tighe*, as opposed to the Eighth Circuit's converse reasoning in Smalley, is more in line with the minimal guidance provided thus far by our highest court in State in the Interest of D.J., supra. Therefore, we hold that prior juvenile

adjudications that resulted absent a jury trial are constitutionally inadequate under the *Apprendi* exception for purposes of subsequent sentence enhancement.

In the instant case, the juvenile matter was heard by a judge, not a jury. The juvenile court, however, did employ the requisite beyond-a-reasonable-doubt standard. The defense asserts that the circumstances of that conviction (for attempted second degree murder) demonstrate the problem with considering a juvenile conviction as an *Apprendi* exception. Following is Quincy Brown's statement when he was adjudicated at the age of fourteen:

> I was at Diana and Verret St. across from the church when Lowdown [Ron Brown] walked up. He was talking to [a] boy named Leroy in a car and he had seen [me] and he asked if I had seen Syble. I told him that the last time I had seen her was around the corner. He said come on and let's go walk around there, I have to ask her something. He said for me to go on around the corner and tell her to meet him at the corner. I went around by Belleville St. and found her and told her that Lowdown wanted to tell her something. She ask me where he was at and I told her that he was around the corner. She said where at and I told her that he was at the side street by Socrates and Belleville St. She told me to walk her to the corner so I walked to the corner and then I went back to where I was. I heard shooting from Belleville and Socrates St. I ran back around the re and asked Johnny and Bebe what happened. They didn't know so I went to the corner where everybody was standing. I saw Syble stumbling around and I asked her

> what had happened. She told me to leave her alone. And she was falling and I picked her [up] and her face was bloody. She told me ["]Lowdown shot me." I walked her to her sister in law house. The man there wouldn't call an ambulance. I walked her back to Diana and Vallette St. and I told Damien to go call an ambulance and I went to wash the blood off my hand.

Defense argues, correctly, that the above statement from the defendant at the age of 14 indicates that there was no evidence that Quincy Brown participated in the crime resulting in the girl's death. In fact, the statement indicates instead that Quincy Brown tried to help the victim. Yet, Quincy Brown was adjudicated guilty of attempted second degree murder.

Paradoxically, Lowdown Brown (no relation to Quincy Brown) was tried before a jury because he was an adult at the time of the crime and the jury acquitted Lowdown. Yet Quincy Brown, with no evidence of being an accessory to anyone, was adjudicated as guilty by a judge and sent to juvenile prison. To use such a defective juvenile adjudication to constitute a "prior conviction" for purposes of the *Apprendi* exception, and allow such prior conviction to be used to enhance the statutory penalty for Quincy Brown's instant offense is constitutionally improper.

We conclude on this issue of excessive sentence that the trial court erred in enhancing the sentence of the defendant on the basis of the prior juvenile conviction. Accordingly, we reverse and remand for re-sentencing consistent with this opinion.

Validity of the Conviction

Defense counsel asserted numerous non-constitutional assignments of error, which challenge the validity of the conviction and summarizes in brief that even if none of the assignments constitute sufficient grounds for reversal, taken together the various alleged errors would serve to be a cumulative error warranting reversal. We disagree. Reviewing the various alleged trial court errors, we find the only allegations with merit to be the following, and the two improper admissions constituted harmless error because the evidence was sufficient to convict the defendant irrespective of these two.

The trial court erred in admitting the 911 tape and arrest warrant, both of which were used for the truth of the matter asserted and thereby constituted hearsay. This evidentiary error, however, was harmless error because there existed sufficient additional evidence that Quincy Brown committed the crime for which he was charged. If hearsay testimony is improperly admitted into evidence, it may be considered harmless error if the reviewing court determines that it did not contribute to the verdict. *State v. Hearold*, 603 So.2d 731, 739 (La.1992). All the information included on the search warrant was received by the court through competent evidence. Thus, the arrest warrant, if indeed it constituted hearsay, was merely cumulative and non-prejudicial.

Similarly, the recording of the 911 emergency calls were also cumulative. Mr. Matthews, the victim, and Officer Hollins both testified as to the contents of the tape recording. Also, there was full opportunity for cross-examination. Therefore, the admission of the tapes was harmless error.

CONCLUSION

For the foregoing reasons, we affirm the convictions, but reverse the sentence as constitutionally excessive. We remand the matter to the trial court for re-sentencing consistent with this opinion.

CONVICTION AFFIRMED; SENTENCE REVERSED; REMANDED.

---

[1] The defendant ultimately pled guilty to the reduced charge of manslaughter on January 28, 2002. See *State v. Brown*, 2001-2463 (La. 4/12/02) __ So. 2d __, 2002 WL 576176.

(2)

Supreme Court, U.S.
FILED
JAN 6 - 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-770

STATE OF LOUISIANA, Petitioner

V.

QUINCY BROWN, Respondent

MOTION FOR LEAVE TO FILE *IN FORMA PAUPERIS*
BRIEF IN OPPOSITION
TO THE STATE OF LOUISIANA'S
PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully asks leave to file the attached conditionally filed cross petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Respondent has previously been granted leave to proceed in forma pauperis in the following court(s): the district court for the Parish of Orleans, the Louisiana Court of Appeals for the Fourth Circuit, and the Louisiana Supreme Court. Respondent's affidavit or declaration in support of this motion is attached hereto.

Respectfully submitted

G. Ben Cohen/pkw

G. Ben Cohen, La Bar No. 25370
Stephen I. Singer (La. Bar No. 27921)
Clive Stafford Smith (La. Bar No. 14444)
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

COUNSEL FOR CROSS-PETITIONER

PROOF OF SERVICE

Undersigned counsel certifies that on this date, the 6th day of January, 2005, pursuant to Supreme Court Rules 29.3 and 29.4, the accompanying motion for leave to proceed *in forma pauperis* and the opposition to the petition for a writ of *certiorari* was served on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing these documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Hon. Eddie J. Jordan, Jr. District Attorney
Donna R. Andrieu, Esq. Assistant District Attorney,
619 South White Street
New Orleans, LA 70119

G. Ben Cohen /pp. KMV

G. Ben Cohen

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Quincy Brown — PETITIONER
(Your Name)

VS.

State of Louisiana — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

(1) Orleans Parish Criminal District Court, State of Louisiana

(2) Louisiana Fourth Circuit Court of Appeal (3) Louisiana Supreme Court

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Quincy Brown
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, _____, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify): _____	$ 0	$	$ 0	$
Total monthly income:	$ 0	$ N/A	$ 0	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
Louisiana State Penitentiary	Drawings	$ 5	$
"	Savings	$ 20	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value N/A

☐ Other real estate
Value N/A

☐ Motor Vehicle #1
Year, make & model N/A
Value

☐ Motor Vehicle #2
Year, make & model N/A
Value

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
N/A		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$
Home maintenance (repairs and upkeep)	$ N/A	$
Food	$ N/A	$
Clothing	$ N/A	$
Laundry and dry-cleaning	$ N/A	$
Medical and dental expenses	$ N/A	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 0	$ N/A

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Petitioner is currently incarcerated at the Louisiana State Penitentiary at Angola, Louisiana

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 28, 2004

Quinley Brown
(Signature)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-770

STATE OF LOUISIANA
Petitioner

V.

QUINCY BROWN,
Respondent

BRIEF IN OPPOSITION TO THE STATE OF LOUISIANA'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

G. Ben Cohen, La. Bar No. 25370
Stephen I. Singer, La. Bar No. 27921
Clive Stafford Smith, La. Bar No. 14444
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

ATTORNEY FOR RESPONDENT MR. BROWN

QUESTION PRESENTED RESTATED

Whether the Sixth Amendment's Grant of the Right To A Jury Trial – Incorporated and Applied to the States through the Fourteenth Amendment – Guaranteeing A Defendant The Right To A Jury Determination of Any Fact Used to Enhance The Sentence Beyond the Statutory Maximum, Renders it Unconstitutional to use a Civil Juvenile Adjudication to Enhance an Adult Sentence?

TABLE OF CONTENTS

QUESTION PRESENTED RESTATED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

BRIEF IN OPPOSITION 1

JURISDICTIONAL STATEMENT 2

STATEMENT OF THE CASE 4

STATEMENT OF FACTS 5

SUMMARY OF ARGUMENT 9

I. There Is No Need to Grant Certiorari as *Jones*, *Apprendi*, And *Blakely* Clearly Prohibit The Use Of Juvenile Judicial Adjudications To Enhance An Adult Sentence Beyond The Statutory Maximum 11

II. Mr. Brown's Juvenile Adjudication – *During Which He Had No Right to a Jury Trial* – Was Unconstitutionally Used to Enhance His Sentence 99 Years above the Maximum 22

CONCLUSION 28

TABLE OF AUTHORITIES

FEDERAL CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998) ..... passim

Apprendi v. New Jersey, 530 U.S. 466 (2000) ..... passim

Blakely v. Washington, 124 S. Ct. 2531 (2004) 20,23

Brown v. Louisiana, 125 S. Ct. 158 (2004) 4

Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 24

Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) 12,16

Goldberg v. Kelly, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) 26

Hannah v. Larche, 363 U.S. 420 (1960) 27

Harris v. Reed, 489 U.S. 255 (Kennedy, J., dissenting) 2

McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986) 16

Jones v. United States, 525 U.S. 227 (1999) ..... passim

Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999) 23

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 25

Michigan v. Long, 463 U.S. 1032 (1983) 2, 3

Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), ... 15,24

Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975) 14,16

Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977) 14,16

Ring v. Arizona, 536 U.S. 584 (2002) 22, 23

Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993) 12

United States v. Gaudin, 515 U.S. 506, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) 12

Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 16

In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) 12,16

STATE CASES

In re C.B., 708 So. 2d at 396 2,3

In the Interest of D.J., 01-2149, 817 So. 2d 26 2,26

State v. Brown, 879 So. 2d 1276 (La., 2004) 2,4

DOCKETED CASES

State v. Brown, No. 2002-KA-1217 (La. App. 4th Cir. 5/29/03) 4

State v. Brown, 03-2788 (La. 07/06/04) 4

STATUES

La. R.S. 15:529.1 4

U.S. Const. amend. VI ..... passim

U.S. Const. amend. VIII ..... passim

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

No. 04-770

STATE OF LOUISIANA
Petitioner

V.

QUINCY BROWN,
Respondent

BRIEF IN OPPOSITION
TO THE STATE OF LOUISIANA'S
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
FOR THE STATE OF LOUISIANA

BRIEF IN OPPOSITION

Pursuant to Rule 15.3, respondent, Quincy Brown files this Brief in Opposition to the Application for Certiorari to the Louisiana Supreme Court.

JURISDICTIONAL STATEMENT

Mr. Brown does not concede jurisdiction, as it appears that a majority of the opinion issued by the Louisiana Supreme Court is predicated on analysis of state law, and the incorporation and application of federal jurisprudence to state law questions.[1] See State v. Brown, 879 So. 2d 1276, 1286-1290 (La., 2004) (holding "we continued to uphold *Dino's* decree that Art. I, § 2 of our State Constitution does not afford a juvenile the right to a jury trial in a juvenile proceeding. *State in the Interest of D.J.*, p. 13, 817 So. 2d at 34. Among our reasons for our continued holding is that even with the changes in the juvenile justice system, "there remains a great disparity in the severity of penalties faced by a juvenile charged with delinquency and an adult defendant charged with the same crime." Id. 817 So. 2d at 33. To allow these adjudications to serve as "prior convictions" for purposes of sentence enhancement for adult felony offenses would lessen this disparity and contribute to "blurring the distinction between juvenile and adult procedures." *In re C.B.*, 708 So. 2d at 396.").

While the Louisiana Supreme Court firmly and fairly applies this Court's jurisprudence in Apprendi v. New Jersey, 530 U.S. 466 (2000), a critical question before the Louisiana Supreme Court was not whether Apprendi applied in Louisiana but rather whether the Court believed in the

---

[1] The Louisiana Supreme Court repeatedly cited the Louisiana Constitutional Provisions, specifically Article I, Section 2 (due process) and Article I, Section 17 (jury trial) as basis for its decision. The Louisiana Supreme Court also refers to the analogous federal provisions. Whether these references are sufficiently "interwoven" to justify this Court's jurisdiction, and whether this Court should continue to rely on the presumption of jurisdiction identified in *Michigan v. Long*, 463 U.S. 1032 (1983) (holding that where "the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.") appears a fairly debatable question. Cf *Harris v. Reed*, 489 U.S. 255, 276 (Kennedy, J., dissenting).

unique role of the juvenile court:

> Under the guise of parens patriae, juvenile courts emphasize treatment, supervision, and control rather than punishment. . . . The hallmark of special juvenile procedures is their non-criminal nature. In re C.B., p. 17, 708 So. 2d at 400. Our state's juvenile system was founded upon the premise that retributive punishment was deemed inappropriate and the juvenile system dispositions should be individually tailored to address the needs and abilities of the juvenile in question. . . .

Id. at 1288. A healthy respect for the Louisiana Supreme Court's determination on how (or whether) it wanted to protect the civil nature of juvenile proceedings is warranted. *Cf* Michigan v. Long, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review . . .").[2]

To the extent the Court finds the mixed references to state and federal law sufficient to warrant the review of this Petition for Certiorari, Respondent files the ensuing *Brief in Opposition*.[3]

---

[2] It is also unclear whether the issuance of this Court's mandate is made moot by the district court's recent re-sentencing of Mr. Brown – without objection or motion for stay – to the term of years provided in the Louisiana Supreme Court decision. It is not clear that the State would have the authority to re-sentence Mr. Brown should this Court grant certiorari and reverse the opinion of the Louisiana Supreme Court.

[3] The *State's Question Presented* no where references the Right to a Jury Trial, guaranteed Mr. Brown under the Sixth Amendment to the United States Constitution, and incorporated and applied to the States through the Fourteenth Amendment. Respondent discusses below the significant violation of his Sixth Amendment Rights that ensued from the proceedings in the trial court.

STATEMENT OF THE CASE

Quincy Brown was born on July 14, 1979. (Tr. XVII at 14). He was charged by bill of information with the armed robbery of Wayne Matthews on March 11, 1999, when he was a nineteen year old teenager (Tr. 1). Mr. Brown pled not guilty at the arraignment on May 27, 1999. On October 3, 2001, the case proceeded to trial before a jury. Later that same day, October 3, 2001, Mr. Brown was found guilty by an 11-1 vote. (Tr. 1520).[4]

At the initial sentencing, the trial court sentenced Mr. Brown to the maximum 99 years on the armed robbery despite the fact that this was young Mr. Brown's first adult conviction. At a later date, the State charged Mr. Brown by bill of information as an habitual offender, see La. R.S. 15:529.1, based solely on a single juvenile adjudication. (Tr. 5). At the habitual offender proceeding, the trial court, having already given Mr. Brown the maximum sentence, not only increased Mr. Brown's sentence -- she doubled it -- again giving him the maximum possible sentence of 198 years.

Quincy Brown timely appealed his conviction and sentence to the Fourth Circuit Court of Appeal. On May 28, 2003, the Fourth Circuit affirmed the conviction, but unanimously reversed the sentence in a written opinion. See State v. Brown, No. 2002-KA-1217 (La. App. 4th Cir. 5/29/03). As noted in the State's Petition for Certiorari, the Louisiana Supreme Court ultimately granted writs and issued an opinion upholding the decision of the intermediate court. See State v. Brown, 03-2788 (La. 07/06/04); 879 So. 2d 1276.

---

[4] This Court denied Mr. Brown's Application for Certiorari of the denial on the appeal of his non-unanimous conviction. *Brown v. Louisiana*, 125 S. Ct. 158 (2004).

STATEMENT OF FACTS

The State's Petition omits a number of relevant facts.

A. The Charged Offense

The charged offense was a one eyewitness case. The state claimed that Wayne Matthews was robbed of the car he was driving in the area of Diana and Verret Streets at around 10:00 p.m. on the night of March 11, 1999. The only evidence against Quincy Brown, however, is Mr. Matthews. And Mr. Matthews himself was shown Quincy Brown's picture by the state on direct examination and testified that that was not the person who robbed him. (Tr. XVII at 87).[5]

In addition, although the car was recovered within a couple of hours in the same area from where it was supposed to have been taken and there were two people inside the car, neither occupant was Quincy Brown. Quincy Brown did not confess or make any inculpatory statements. There was simply nothing to corroborate Mr. Matthews' story.

Moreover, Mr. Matthews is a witness of extremely dubious reliability. To be charitable, Mr. Matthews, at best, presented as a bizarre individual whose testimony was variously incomprehensible, inconsistent and thoroughly impeached. As stated above, on direct examination by the state, Mr. Matthews testified that the picture of Quincy Brown was *not* the

---

[5] No fingerprints, no DNA, no hair, and no fibers connect Quincy Brown to the incident. Although Mr. Matthews claimed a gun was used, no gun was recovered. Although Mr. Matthews claimed the gun was fired during the encounter inside the car, no bullet was found. Although Mr. Matthews claimed the gun was a semi-automatic, no shell casing was found. In addition, though the gun was supposed to have been fired inside a car, no gunpowder residue was found. In short, there is absolutely no physical evidence to corroborate Mr. Matthews or link Quincy Brown to this offense. (Tr. XVII at 132).

man who carjacked him. (Tr. XVII at 87).[6] When asked about what he was doing on the night of the incident, Mr. Matthews unblinkingly told the jury, "I'm look[ing] for [expletive deleted] if you want to know", brazenly using derogatory slang terminology for a part of the female anatomy. (Tr. XVII at 108).

Mr. Matthews also testified that he knew Quincy Brown from before the incident. However, Mr. Matthews himself initially told the police detective that "the perpetrator is unknown to me" (Tr. XVII at 132). Indeed, in his initial 911 call to the police moments after the incident supposedly happened, the 911 operator asks Mr. Matthews for a description of the perpetrator and Mr. Matthews never mentions the person's name and simply gives a clothing description.[7]

The circumstantial evidence strongly suggests that Mr. Matthews was cruising the neighborhood in search of drugs, and was either ripped off by his dealer or rented his car for a

---

[6] Ultimately, after Mr. Matthews was pressed with leading questions, over repeated defense objection, the state got Mr. Matthews to say that it was Quincy Brown who had robbed him. (Tr. XVII at 89-90).–

[7] This makes no sense at all. Obviously, if Mr. Matthews knew Quincy Brown from before and Quincy Brown was in fact the perpetrator, Mr. Matthews would not have simply given a clothing description and said the perpetrator is unknown to me. In addition, during his testimony, Mr. Matthews repeatedly said that he suffered from sleep apnea and could not "remember a lot of things." (Tr. XVII at 91). For example, when asked on direct examination by the state "to describe for the jury in a little bit more detail what exactly happened that night" Mr. Matthews responded, "I'll do the best I could. I mean, I got sleep apnea. I don't remember a lot of things." Id. This, although Mr. Matthews also testified that he was a truck driver. (Tr. XVII at 99). Further, when confronted with inconsistencies in his testimony, missing details, or things that just did not make any sense, Mr. Matthews would respond with statements like "I can't remember everything from one minute to the next." (Tr. XVII at 109). For example, when confronted with the fact that he told the detective right after the incident that it happened very quickly, while at trial he testified that it lasted about 20 minutes, Mr. Matthews responded, "I also told you I have sleep apnea. I can't remember everything from one minute to the next." Id.

short period of time in exchange for drugs and then became concerned about getting it back. This corner was known for the distribution of drugs – a dark street with various abandoned houses known for little else. And supposedly, Mr. Matthews drove around the block for ten minutes talking with the person he later claimed robbed him. (Tr. XVII at 106).

Moreover, Mr. Matthews conceded that a crack pipe was found in his car. (Tr. VXII at 110-112). Mr. Matthews claimed that it was not his. Id. Mr. Matthews himself, however, prevented the pipe from ever being tested to show who it belonged to because he threw it away. Id. In order to avoid the appearance that he was covering up, Mr. Matthews then claimed that the police told him to throw away this crucial piece of physical evidence. Id. The police did not back up Mr. Matthews story. [8]

Finally, while Mr. Matthews' direct examination by the state began with his testimony that the picture of Quincy Brown was not the person who robbed him, it ended equally unsupportive of the state with his description of the condition of the car when he got it back just a few hours later. According to Mr. Matthews, the only difference in the car was that when the car was taken it was empty of gas, and when it was returned it was full.[9]

---

[8] Further, while on the witness stand Mr. Matthews told this truly bizarre story about paying for sex with two separate women named Anna and Tasha. As it turns out, Anna and Tasha were cousins. According to Mr. Matthews, "I was having fun." (Tr. XVII at 100). Mr. Matthews then revealed that at some point prior to the alleged incident, he learned that Quincy Brown is Tasha's boyfriend. According to Mr. Matthews, while at Anna's house, he saw Quincy and Tasha together and was unhappy to learn that Quincy was Tasha's boyfriend.

[9] Thus, much to the prosecutor's surprise and chagrin, Mr. Matthews testified:

Q. And could you describe what kind of condition it was in after you got it back?

A. Well when they took it, it was empty. When I got it back it was full

The jury that convicted Mr. Brown was not unanimous.[10]

B. <u>The Juvenile Adjudication</u>

When a child, fourteen year old Quincy Brown was "adjudicated" for complicity in an attempted second degree murder. His statement, which provided the *entire* case against him, reflected that he was not guilty of this offense:

> I was at Diana and Verret St. across from the church when Lowdown [Ron Brown] walked up. He was talking to [a] boy named Leroy in a car and he had seen [me] and he asked me if I had seen Syble. I told him that the last time I had seen her was around the corner. He said come on and let's go walk around there, I have to ask her something. He said for me to go on around the corner and tell her to meet him at the corner. I went around by Belleville St. and found her and told her that Lowdown wanted to tell her something. She ask me where he was at and I told her that he was around the corner. She said where at and I told her that she was at the side street by Socrates and Bellville St. She told me to walk her to the corner so I walked to the corner and then I went back to where I was. I heard shooting from Bellville and Socrates St. I ran back around there and asked Johnny and Bebe what happened. They didn't know so I went to the corner where everybody was standing. I saw Syble stumbling around and I asked her what had happened. She told me to leave her alone. And she was falling and I picked her [up] and her face was bloody. She told me ["]Lowdown shot me.["] I walked her to her sister in law house. The man there wouldn't call an ambulance. I walked her back to Diana and Vallette St. and I told Damien to go call an ambulance and I went to wash the blood off my hand.

(Tr. 1297). There was no evidence that Quincy took part in this crime – indeed, the evidence

---

Q. of what?

A. Gas.

Q. So it came back with a full tank of gas?

A. Right

(Tr. XVII at 94).

[10] A cross-petition raising the constitutionality of non-unanimous jury verdicts is filed contemporaneous to this Brief in Opposition.

showed that he later tried to help the victim. Neither "Lowdown" Brown (no relation of Quincy's) nor any other witness provided any evidence that Quincy knew what "Lowdown" was going to do. The only crime Quincy committed was to tell a woman that "Lowdown" wanted to see her. [11]

The use of this adjudication presents a paradox entwined in various anomalies. The young Mr. Brown could not have possibly committed any crime in relation to this charge if "Lowdown" Brown was innocent of the allegations. Lowdown was an adult, and was therefore permitted a jury trial. The jury ultimately acquitted Lowdown of the offense, thereby illustrating the immense importance of the jury trial in our constitutional scheme. Yet Mr. Brown, with no evidence establishing that he was an accessory, let alone as a principle, was adjudicated delinquent by the juvenile judge.

From these facts, uncontested by the state, Mr. Brown was sentenced to 198 years in prison. Half of this sentence arose from facts never in the purview of a jury.

SUMMARY OF ARGUMENT

In Almendarez-Torres v. United States, 523 U.S. 224 (1998), this Court held that a prior adult felony criminal conviction, could be used to increase a sentence beyond the statutory maximum for the crime charged without the necessity of being separately charged in the indictment.

---

[11]The violation of Quincy Brown's rights did not end with the "trial." Quincy Brown was never advised of his right to appeal his conviction and sentence, or of his right to seek post-conviction relief in this case. (Tr. 1302). The unrebutted testimony in the lower court proved that his adjudication was therefore constitutionally defective, *and* that he suffered prejudice from this. Mr. Brown does not mean to suggest that he has a burden of proving prejudice. Where a juvenile is absolutely denied the panoply of constitutional rights, including the right to a jury trial, that adjudication cannot be used to enhance an adult sentence.

In this case, the State seeks to extend the Almendarez-Torres exception for prior adult felony convictions to juvenile adjudications.

In Jones v. United States, 525 U.S. 227 (1999), this Court explained that the Almendarez-Torres' prior adult conviction exception is grounded upon a definition of prior convictions as only those "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees*." Jones, 525 U.S. at 249 (emphasis added).

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court held that any fact which increases the potential sentence beyond the statutory maximum must be proven to the jury beyond a reasonable doubt. Apprendi, 530 U.S. at 497.

When faced with the question of whether the State could enhance an adult conviction with an juvenile adjudication, the Louisiana Supreme Court correctly observed that juvenile adjudications could not be used to enhance an adult sentence under the *Apprendi* rule because the "'Prior convictions' are excepted from the *Apprendi* holding only because they were the product of proceedings that afforded crucial procedural protections - particularly fair notice, the right to jury trial and proof beyond a reasonable doubt." While the Court found that juvenile adjudications "can be reliably and constitutionally obtained without the right to a jury trial, this is because the juvenile proceeding is a "civil" proceeding with a focus on rehabilitation and non-criminal treatment of the adjudicated delinquent." Brown, at 1290.

The State, in its Petition for Certiorari asserts that the "crucial dissemination under Appendi is whether the fact used to enhance the sentence is an element of the offense or a sentencing factor." State's Petition at 6. The State then asserts, at State's Petition, 8, that the juvenile adjudication is not an element of an offense but a sentencing factor. This argument misstates the jurisprudence of

this Court and does not merit the attention of a grant of certiorari.

ARGUMENT

I. There Is No Need to Grant Certiorari as *Jones*, *Apprendi*, And *Blakely* Clearly Prohibit The Use Of Juvenile Judicial Adjudications To Enhance An Adult Sentence Beyond The Statutory Maximum

There is no need to grant certiorari as *Jones*, *Apprendi*, and *Blakely* clearly prohibit the use of juvenile judicial adjudications to enhance an adult sentence beyond the statutory maximum. Ten (even five) years ago it might have been an open question, whether the state could use a juvenile adjudication – where there was no right to a jury trial – to enhance an adult sentence beyond the statutory maximum.[12] Since this Court's decision in Apprendi, and the now after the ensuing decisions in Ring and Blakely, it is abundantly clear that a juvenile adjudication where there was no right to a jury trial cannot be used to enhance an adult sentence.

A. Introduction

At the outset, it is important to recognize that Quincy Brown's right to have every fact affecting the maximum adult criminal sentence he faced subject to determination by a jury of his peers is no mere formality. Rather, this right is the very foundation of our entire system of criminal justice, and indeed our constitutional form of government in the United States. As this Court emphasized in Apprendi v. New Jersey, 530 U.S. 466:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these

---

[12] Cf Almendarez-Torres, 523 U.S. 224 (1998) (allowing prior adult felony conviction to enhance adult sentence).

> rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin, 515 U.S. 506, 510, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995);* see also *Sullivan v. Louisiana, 508 U.S. 275, 278, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993); Winship, 397 U.S. at 364* ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").
>
> As we have, unanimously, explained, *Gaudin, 515 U.S. at 510-511,* the historical foundation for our recognition of these principles extends down centuries into the common law. "To guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) (hereinafter Blackstone) (emphasis added). See also *Duncan v. Louisiana, 391 U.S. 145, 151-154, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).*

Apprendi, 530 U.S. at 476-77 (emphasis added) (footnote omitted). Accordingly, in Apprendi the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause imposes upon the States the constitutional requirement that any fact which increases the potential sentence beyond the statutory maximum must be established through procedures honoring the right to fair notice (indictment), trial by jury and proof beyond a reasonable doubt. Apprendi, 530 U.S. at 497.

At issue in Apprendi was New Jersey's hate crime legislation which provided for a sentence enhancement beyond the statutory maximum for the offense if the offense was motivated by racial bias. The New Jersey statute provided that the enhancement would apply if the racial animus were proven by a preponderance of the evidence (rather than beyond a reasonable doubt), to the satisfaction of judge (as opposed to the jury). In striking down the New Jersey statute, the United States Supreme Court found that both prongs of the statute – both the lesser standard of proof and

the change in factfinder from jury to judge, violated due process.[13] Thus, the High Court held:

> Our answer to th[is] question was foreshadowed by our opinion in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476.

In this regard, it is important to understand that the source of the supposed "exception" for prior adult convictions, upon which the state relies here, is not Apprendi. Rather, the source of this "exception" is the Supreme Court's opinion in Almendarez-Torres.

B. The *Almendarez-Torres -- Jones -- Apprendi* Saga

In Almendarez-Torres, 523 U.S. 224 (1998), this Court held that a prior adult felony conviction could be used by the judge to increase the maximum sentence for the crime of illegal re-entry into the United States from two years to twenty years without the necessity of presenting the prior felony element to the grand jury for indictment.[14] Almendarez-Torres was decided in 1998 by a closely divided 5-4 Court over a vigorous dissent authored by Justice Scalia.

---

[13] Indeed, the Court specifically characterized the right to trial by jury and the right to proof beyond a reasonable doubt as "equally well founded . . . companion right[s]" Apprendi, 530 U.S. at 477.

[14] Notably, Alemendarez-Torres did not challenge the identity of the factfinder (judge rather than jury), which is what is at issue here, or the burden of proof used (preponderance rather than beyond a reasonable doubt). He only challenged the government's failure to provide adequate notice by specifically indicting him under the enhancement provision with the prior conviction as an element of that offense. See Almendarez-Torres, 523 U.S. at 227; see also Jones, 526 U.S. at 248-49 ("the case is not dispositive of the question here . . . because we are concerned with the Sixth Amendment right to jury trial and not alone the rights to indictment and notice as claimed by Almendarez-Torres).

In his dissent in Almendarez-Torres, Justice Scalia raised for what appears to be the first time the issue of what facts must be subjected to the constitutional requirements of fair notice (indictment), proof beyond a reasonable doubt, and proof to a jury. Thus, Justice Scalia wrote:

> That it is genuinely doubtful whether the Constitution permits a judge (rather than a jury) to determine by a mere preponderance of the evidence (rather than beyond a reasonable doubt) a fact that increases the maximum penalty to which a criminal defendant is subject, is clear enough from our prior cases resolving questions on the margins of this one.

Almendarez-Torres, 523 U.S. at 251 (Scalia, J. dissenting) (citing In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S.Ct. 1068 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975),; Patterson v. New York, 432 U.S. 197, 210 (1977). Although, Justice Scalia's opinion did not garner a majority of the High Court in 1998, as it turned out Almendarez-Torres was not end of the story, but merely the opening salvo.

One year later, in Jones v. United States, 526 U.S. 227 (1999), this Court held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of the right to trial by jury required that any fact that increased the maximum penalty to which the defendant is exposed is an element of the offense that must be indicted and subject to proof beyond a reasonable doubt to a jury of one's peers. In so doing, the Supreme Court specifically distinguished Almendarez-Torres, and its holding regarding prior adult felony convictions, because the prior conviction was itself previously established through procedures satisfying the constitutional requirements of notice (indictment), proof beyond a reasonable doubt and the right to trial by jury. As the Court put it:

> One basis for that possible constitutional distinctiveness [between prior adult felony convictions and other facts] is not hard to see: unlike virtually any other consideration used to enlarge the possible penalty for an offense, and certainly unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and

Sixth Amendment questions implicated . . . as the Government urges.

Jones, 526 U.S. at 249.

Thus, this Court explained that its holding in Almendarez-Torres regarding prior adult felony convictions is limited to facts "established through procedures satisfying the fair notice, reasonable doubt *and jury trial guarantees*." Id. at 249-50 (emphasis added). Where prior adult felony convictions are concerned, the factual basis for the increase in the maximum punishment has already been determined in accord with the constitutional guarantees to notice, proof beyond a reasonable doubt, and the right to trial by jury. Therefore, none of those fundamental constitutional rights are offended by increasing the maximum sentence based upon the prior conviction.

The majority in Jones was comprised of the Justices who joined Justice Scalia's dissent in Almendarez-Torres with the addition of Justice Thomas, who had sided with the majority in Almendarez-Torres. Scrutiny of the concurring and dissenting opinions in Jones confirms that in Jones, this Court appears to have embraced Justice Scalia's reasoning in his Almendarez-Torres dissent. Justice Scalia's concurrence, in its entirety states:

> In dissenting in *Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998),* I suggested the possibility, and in dissenting in *Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2255-2257, 141 L. Ed. 2d 615 (1998),* I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed. Because I think it necessary to resolve all ambiguities in criminal statutes in such fashion as to avoid violation of this constitutional principle, I join the opinion of the Court.

Id. at 254 (Scalia, J., concurring) (emphasis added).

In a similar vein, Justice Stevens wrote in his concurrence:

> Like JUSTICE SCALIA, see *post,* at 1, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

> It is equally clear that such facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in *In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975),* and *Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977).* To permit anything less "with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." *432 U.S. at 215.* This principle was firmly embedded in our jurisprudence through centuries of common law decisions. *See, e.g., Winship, 397 U.S. at 361-364; Duncan v. Louisiana, 391 U.S. 145, 151-156, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).* . . .If *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986),* and Part II of the Court's opinion in *Walton v. Arizona, 497 U.S. 639, 647-649, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990),* departed from that principle, as I think they did, see *McMillan, 477 U.S. at 95-104* (STEVENS, J., dissenting) and *Walton, 497 U.S. at 709-714* (STEVENS, J., dissenting), they should be reconsidered in due course. It is not, however, necessary to do so in order to join the Court's opinion today, which I do.

Id. at 252-53 (Stevens, J., concurring) (emphasis added).

While the dissenting Justices in Jones disagreed with the majority's defacto overruling of Almendarez-Torres, which had only been decided one year earlier, there was absolutely no doubt in their minds, as in the minds of the Jones' majority, that that is exactly what the Court's opinion in Jones meant.[15]

---

[15] Thus, the dissent complained:

> Had it involved simply a question of statutory interpretation, the majority opinion would not have been cause for much concern. Questions of statutory interpretation can be close but nonetheless routine. That should have been so in today's case. The Court, however, is unwilling to rest its opinion on textual analysis. Rather, to bolster its statutory interpretation, the Court raises the specter of "'grave and doubtful constitutional questions,'" *ante*, at 12, without an adequate explanation of the origins, contours, or consequences of its constitutional concerns. The Court's reliance on the so-called constitutional doubt rule is inconsistent with usual principles of *stare decisis* and contradicts the approach followed just last Term in *Almendarez-Torres v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998).* Our precedents admit of no real doubt regarding the power of Congress to establish serious bodily injury and death as sentencing factors rather than offense elements, as we made clear in *Almendarez-Torres.* Departing from this recent authority, the Court's sweeping constitutional

Jones represents a watershed shift whereby the reasoning of Justice Scalia's dissent in Almendarez-Torres, "that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," Apprendi at 254, essentially became the law of the land.

Any doubt about this watershed change in constitutional law was subsequently removed with the Supreme Court's decision the very next year in Apprendi. In Apprendi, after a thorough and extended fifteen page survey of the history of the right to trial by jury and requirement of proof beyond a reasonable doubt in criminal cases, the Supreme Court reaffirmed its holding in Jones and extended it to the States. In Jones, the Court had held that the Fifth Amendment's Due Process Clause and the Sixth Amendment's guarantee of the right to trial by jury required that *in a federal case* any fact that increased the maximum adult criminal punishment had to be subject to proof beyond a reasonable doubt to a jury.

In Apprendi, the Court made this requirement *applicable to the States* through the Fourteenth Amendment's Due Process Clause. Thus, the Court held that the Fourteenth Amendment, like the Fifth Amendment, imposes upon the States a requirement that any fact that increases the penalty for a crime beyond the prescribed statutory maximum is an element of a new offense that must be submitted to a jury and proven beyond a reasonable doubt. As the High Court stated:

> In sum, our reexamination of our cases in this area, and of the history upon

---

> discussion casts doubt on sentencing practices and assumptions followed not only in the federal system but also in many States. Thus, among other unsettling consequences, today's decision intrudes upon legitimate and vital state interests, upsetting the proper federal balance. I dissent from this unfortunate and unnecessary result.

Id. at 254 (emphasis added).

> which they rely, confirms the opinion that we expressed in Jones. . . ."It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." *526 U.S. at 252-253* (opinion of STEVENS, J.); see also *526 U.S. at 253* (opinion of Scalia, J.).

Apprendi, 530 U.S. at 491 (emphasis added).[16]

In addition, the majority explained why Almendarez-Torres did not control and reiterated what distinguished the Almendarez-Torres exception for prior adult felony convictions. As the Court explained:

> Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies -- all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.

---

[16] Indeed, in decrying the Court's ruling in Apprendi, the dissent explicitly acknowledged the import of the Court's decision. Thus, Justice O'Connor writes:

> Last Term, in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999),* this Court found that our prior cases suggested the following principle: "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* At the time, JUSTICE KENNEDY rightly criticized the Court for its failure to explain the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the *Federal Government and States alike. 526 U.S. at 254, 264-272* (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in Jones.

Apprendi, 530 U.S. at 524 (emphasis added).

Apprendi, 530 U.S. at 488 (emphasis added). Thus, the Court reiterated the limitation on the Almendarez-Torres exception to convictions established pursuant to proceedings guaranteeing the right to proof beyond a reasonable doubt and trial by jury.

But the Court's discussion of Almendarez-Torres did not end there. Rather, the Court went on to acknowledge that logically its reasoning in Jones and Apprendi is flatly inconsistent with Almendarez-Torres and requires elimination of the exception for prior adult felony convictions. Indeed, the Court's opinion explicitly states:

> Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

Apprendi, 530 U.S. at 489-90. [17]

---

[17] Thus, by the time of Apprendi, a majority of the Supreme Court recognizes that Almendarez-Torres itself was incorrectly decided, and that even the exception for prior *adult* convictions violates due process. Any remaining scintilla of doubt about this is removed by Justice Thomas' concurrence in Apprendi. In Almendarez-Torres Justice Thomas had sided with the majority providing the critical fifth vote that created the "exception" for prior adult felony convictions. Two years later, concurring in Apprendi Justice Thomas, writing for himself and Justice Scalia, reversed field and flatly states that Almendarez-Torres was wrongly decided:

> The consequence of the above discussion for our decisions in Almendarez-Torres and McMillan should be plain enough, but a few points merit special mention.
>
> * * * *
>
> Second, and related, one of the chief errors of Almendarez-Torres -- an error to which I succumbed -- was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. *523 U.S. at 243-244;* see *id. at 230, 241.* For the reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by

Any question whether Apprendi was here to say has been answered by this Court's decision in Blakely v. Washington, which made clear:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As Apprendi held, HN13every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter

Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004)

C. Conclusion

Accordingly, scrutiny of the Almendarez-Torres, Jones, and Apprendi triumvirate makes at least two points salient to the juvenile adjudication issue crystal clear. First, to the extent that the

---

> law the basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, supra, at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, e.g., *Maguire, 47 Md. at 498; Sickles, 156 N.Y. at 547, 51 N.E. at 290.*

Apprendi, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted).

Almendarez-Torres prior adult felony conviction exception remains at all, it is clearly restricted to convictions established through procedures guaranteeing the rights to fair notice (indictment), proof beyond a reasonable doubt and trial by jury. This is explicitly stated in both Jones and Apprendi.[18]

Perhaps more importantly, the Almendarez-Torres prior adult felony conviction exception, which the state is trying to extend here, really no longer exists. In Jones, Justice Thomas, who provided the crucial fifth vote creating Almendarez-Torres, aligns himself with the Almendarez-Torres dissenters to create a new majority. The next year, in Apprendi, Justice Thomas writes flat-out that he was in error in Almendarez-Torres and that that case is wrongly decided. The Opinion of the Court in Apprendi could not be more blunt about the continuing vitality of Almendarez-Torres and bears repeating:

> Even though it is arguable that Almendarez-Torres was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule we recalled at the outset. Given its unique facts, it surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence.

---

[18] See Jones, 526 U.S. at 249 ("unlike the factor before us in this case, a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. *Almendarez-Torres* cannot, then, be read to resolve the due process and Sixth Amendment questions implicated . . . as the Government urges."); Apprendi, 530 U.S. at 496 ("[T]here is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof."); see also Apprendi, 530 U.S. at 488 ("Rejecting Almendarez-Torres' objection, we concluded that sentencing him to a term higher than that attached to the offense alleged in the indictment did not violate the strictures of *Winship* in that case. Because Almendarez-Torres had admitted the three earlier convictions for aggravated felonies -- all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own -- no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.").

Apprendi, 530 U.S. at 489-90.

II. Mr. Brown's Juvenile Adjudication – *During Which He Had No Right to a Jury Trial* – Was Unconstitutionally Used to Enhance His Sentence 99 Years above the Maximum

Mr. Brown was convicted of armed robbery and sentenced to 99 years in prison. The State then filed a bill of information charging Mr. Brown as a habitual offender, and used Mr. Brown's juvenile adjudication – at which he had no right to a jury trial – to enhance his sentence, in this case by 99 years. The state attempts to argue that this is acceptable because the prior adjudication is a sentencing factor not an element. State's Petition at 8,10. This act of imaginative lexicography is flatly contradicted by this Court's jurisprudence – which has held that it doesn't matter what a fact is called, but only matters what a fact does:

> What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in Almendarez-Torres, supra, at 235, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less applicable to the fact of a prior conviction. See, e.g., *Maguire, 47 Md. at 498; Sickles, 156 N.Y. at 547, 51 N.E. at 290.*

Apprendi, 530 U.S. at 519-21 (Thomas, J. concurring) (footnote omitted). As this Court made clear in Ring v. Arizona, 536 U.S. 584 (2002):

> The dispositive question [under Apprendi] "is one not of form, but of effect." If a State makes an increase in a defendant's authorized punishment contingent on the finding of fact, that fact -- no matter how the State labels it -- must be found by a jury

beyond a reasonable doubt.

Ring, 536 U.S. at 602 (quoting Apprendi, 530 U.S. at 494) (emphasis added). In case it was not clear enough, Justice Scalia put it bluntly:

> All facts essential to the imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.

Ring, 536 U.S. at 610 (Scalia, J., concurring)

Indeed, in the face of complaint that this Court might be *de facto* holding the entire federal sentencing scheme unconstitutional, this Court made clear that the right to a jury determination of all facts used to enhance a sentence was not a luxury:

> Our commitment to Apprendi in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it [***19] is better to leave them out of the Legislative"); Jones v. United States, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999). Apprendi carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Blakely v. Washington, 124 S. Ct. 2531, 2538-2539 (2004)

The state suggests that Mr. Brown received a constitutionally permissible amount of process because a judge

> at a multiple bill hearing where the State had the burden of proving the elements of Louisianas' Habitual Offender Statute, namely that Mr. Brown had been adjudicated in a juvenile proceeding of attempted second degree murder. . . . Moreover, Brown's adjudication was reliably determined in a proceeding which satisfied constitutional standards, including the right to notice, right to counsel right to confront and cross examine witnesses and the privilege against self-incrimination.

State's Petition at 9.[19]

This Court has made clear that the text of the Constitution, and not our (or rather the judiciary's) assessment of that which is reliable, is required.[20]

---

[19]To be sure, what must be proven to a jury must be proven beyond a reasonable doubt (after fair notice, with the right to counsel, at a hearing at which a defendant has the right to confront and cross-examine witnesses). But, first and foremost, Jones and Apprendi are all about what facts must be determined by a jury. To suggest otherwise is utter nonsense. In both Jones and Apprendi the Court discusses at length, over nine pages in Jones, see Jones, 526 U.S. 240-49, and over fifteen pages in Apprendi, see Apprendi, 530 U.S. at 476-91, the central importance of the right to trial by jury and its historical development in connection with our Constitution. This is what these cases are about – the right to trial by jury -- what facts must be submitted to a jury, and what facts need not be. Thus, Justice Scalia, who first raised the issue in his Almendarez-Torres dissent, in Jones, presents the issue explicitly:

> In dissenting in *Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998),* I suggested the possibility, and in dissenting in *Monge v. California, 524 U.S. 721, 118 S. Ct. 2246, 2255-2257, 141 L. Ed. 2d 615 (1998),* I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.

Id. at 254 (Scalia, J., concurring) (emphasis added). Similarly, Justice Stevens wrote:

> Like JUSTICE SCALIA, see *post,* at 1, I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.

Id. at 252-53 (Stevens, J., concurring) (emphasis added). Accordingly, Jones and Apprendi stand for more than the proposition that is sufficient if facts that increase prescribed range of penalties are submitted to a jury. Rather, submission of such facts to the jury is a constitutional imperative.

[20] See Crawford v. Washington, ___ U.S. ___, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (making clear that hearsay which may be reliable must be excluded because it violates the text of

In Apprendi, and now Ring and Blakely, the Court has made clear that the Sixth Amendment requires a jury determination, and is not satisfied by a judicial finding – regardless of the burden of proof, and regardless of the other rights given to the defendant at the proceeding. For instance, at Blakely's sentencing, he too had "the right to counsel right to confront and cross examine witnesses and the privilege against self-incrimination." The Court found that without a jury determination, this was not sufficient.

Blakely, Ring, Jones and Apprendi are cases about the right to trial by jury and what facts must be found by a jury.[21] *The* issue in Blakely, Ring, Jones and Apprendi is *the right to trial by jury*. Therefore, to suggest that a Court could reduce those because the procedure was mostly "reliable" is untenable.

Finally, the state maintains that it is constitutional to use a juvenile adjudication to increase an adult criminal sentence beyond the statutory maximum because under McKeiver v. Pennsylvania, 403 U.S. 528 (1971), a determination by a judge is reliable enough to satisfy the due process

---

the Sixth Amendment, which grants along with the right to a jury trial, the right to cross examination).

[21] Even the dissenters in Apprendi recognized this stating, "Today, in what will surely be remembered as a watershed change in constitutional law, *the Court imposes as a constitutional rule the principle it first identified in Jones*." Id. 530 U.S. at 524 (O'Connor, J. dissenting) (emphasis added). Similarly, Justice Scalia, in his concurrence, writes:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee -- what it has been assumed to guarantee throughout our history -- the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.

Apprendi, 530 U.S. at 498-99. Clearly, then, what is being debated is not merely what is sufficient under the Constitution, but what is a constitutional "rule" or "right" -- i.e. what is constitutionally mandated.

requirements for juvenile proceedings. In other words, because the judge's determination satisfied due process in the juvenile proceeding, it should satisfy due process here. The argument is a non-sequitur. Simply because certain procedures satisfy due process in one context, does not mean those same procedures satisfy due process in all contexts.[22]

Due process is a variable rather than a static concept. What process is due depends on what life, liberty or property interests are at stake, and specifically what the government seeks to take away from an individual. See Goldberg v. Kelly, 397 U.S. 254, 263, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) ("consideration of what procedures due process may require under any given set of circumstances

---

[22] Moreover, juvenile proceedings cannot be said to be reliable for purposes of imposing adult criminal punishment. It is well-known that juvenile court judges, faced with a clearly troubled youth in dire family circumstances, sometimes find factual "guilt" when a jury would not, simply so that the Court can then be in a position to reach out and help the child by requiring that the State provide services and special assistance. As this Court itself acknowledged:

> Indeed, affording juvenile offenders the right to trial by jury would tend to destroy the flexibility of the juvenile judge as the trier of fact, which allows the judge to take into consideration social and psychological factors, family background, and education in order to shape the disposition in the best interest of both the child and society.

In the Interest of D.J., 01-2149, (La. 05/14/02), 817 So. 2d 26, 33.

The juvenile adjudication at issue in this case is a prime example of the unreliability of juvenile proceedings for purposes of imposing adult criminal punishment. Quincy Brown was "adjudicated" based upon his statement. As recounted above, however, his statement made him guilty of nothing more than being present when another person committed a crime, and then attempting to assist the victim. Undoubtedly, this evidence was legally insufficient to support the adjudication. In fact, the adult perpetrator, with the right to trial by jury, was acquitted. As a juvenile, however, Quincy Brown, was never advised of his right to appeal his conviction and sentence, or of his right to seek post-conviction relief. (Tr. 1302). While there may be nothing that can be done now to right this injustice, it certainly means that there is no basis for compounding it based on theoretical arguments about the supposed "reliability" juvenile proceedings.

must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.")); see also Hannah v. Larche, 363 U.S. 420, 440, 442 (1960). The amount of process due for a parking ticket is vastly different, and much, much less, than the process that is due when the government charges a capital offense. Id. The reason is simple: in the case of the parking ticket the government is only seeking a small fine, while in the capital case the government is seeking to take away a person's life. Id. Accordingly, the procedures the government must satisfy are substantially greater and more onerous in a capital case than for a parking ticket. Id.

In McKeiver, as in In the Interest of D.J., the Court held that it was not necessary for the government to afford the accused the procedural protection of the right to trial by jury. In other words, the process due in juvenile court is less than the process due in adult criminal court. But the reason for this is that the nature of the interests at stake is less in the "civil like proceedings in the juvenile court." In the juvenile context, the government is not seeking to impose purely punitive adult criminal sanctions. Rather, the goal of the juvenile system is to rehabilitate and reform the wayward youth and set them on a path to becoming a responsible adult member of the community. These differences, therefore, justify a difference in procedures – i.e. the amount of process that is due.

In this case, however, the government is seeking to impose additional adult criminal sanctions. The question is not what process was due back in 1993 in juvenile court when the government was seeking to impose juvenile sanctions. The question is what process was due when the government sought to impose an additional adult criminal sanctions beyond the statutory maximum -- and an additional ninety-nine years at hard labor in an adult prison, at that. And on that

score the Constitution and Supreme Court's decision in Apprendi is absolutely clear. As Justice Scalia summed it up at the end of his concurring opinion in Apprendi,

> the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Apprendi, 530 U.S. at 499 (emphasis added).

CONCLUSION

In arguing that it should be able to use juvenile adjudications, where there is no right to trial by jury, to subject Quincy Brown to additional adult criminal sanctions beyond that statutorily provided for the offense of which the jury convicted him, the state maintains that findings by a judge (or perhaps two) are reliable, and good enough. Justice Scalia's concurrence in Apprendi responds sufficiently to this proposition:

> The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free. . . . JUSTICE BREYER proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean.
>
> It does not; it means what it says. And the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury" has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury.

Apprendi, 530 U.S. at 498-99.

The state's application for writ of certiorari should be denied. In the alternative, the judgment of the Louisiana Supreme Court should be affirmed.

Respectfully submitted,

G. Ben Cohen (La. Bar No. 25379)
Stephen I. Singer (La. Bar No. 27921)
Clive Stafford Smith (La. Bar No. 14444)
636 Baronne Street
New Orleans, LA 70113
(504) 558-9867

COUNSEL FOR RESPONDENT